Supreme Court, U.S.
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No. 09-1363

In the

Supreme Court of the United States

DAVA DALVIT and
DEBRA BENJAMIN,

Petitioners,

v.

UNITED AIR LINES, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit is now approving novel procedural devices to dismiss Title VII retaliation cases including (a) requiring the victim of retaliation in the workplace to list each "discrete" retaliatory act against him or her in the EEOC charge as a prerequisite to filing in court (thus obviating the prior rule that eventually-filed court claims could include acts that would have been naturally encompassed or discovered within the EEOC's investigation even if not listed as "discrete acts" in the EEOC charge; (b) obviating F.R.E. 701 opinion evidence of long-term employees based upon reasonable conclusions from their own observations of discrimination and retaliation in the workplace; and (c) requiring "substantial evidence" of pretext in derogation of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), which established that a mere suspicion of mendacity was sufficient to survive summary judgment. Multiple circuits have adopted the new, tougher standard for a showing of pretext.

The questions presented are:

Whether retaliation complainants are required to list each specific employer act against them in their EEOC charges in order to later complain about those specific acts in federal court.

QUESTIONS PRESENTED (cont'd)

Whether Title VII retaliation victims can bring actions in federal court as to acts that would have been encompassed within the EEOC investigation even if not specifically listed in the EEOC charge.

Whether F.R.E. 701 applies to discrimination/retaliation witnesses who have observed company practices, including retaliation practices, for many years so that they may express lay opinions thereon.

Whether "substantial evidence" of pretext, rather than a mere suspicion of mendacity, is required to defeat motions for summary judgment in discrimination/retaliation cases.

PARTIES TO THE PROCEEDING

There are no parents or subsidiaries known to petitioners.

TABLE OF CONTENTS

Page

Question Presented. i

Table of Contents iv

Table of Cited Authorities vii

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved. 1

Statement of the Case. 2

A. Factual Background. 2

B. Decision of the Court of Appeals. . . . 27

Reasons for Granting the Petition 28

I.

THE CIRCUITS ARE SPLIT AS TO WHETHER RETALIATION COMPLAINANTS ARE REQUIRED TO LIST EACH "DISCRETE" EMPLOYER ACT AGAINST THEM IN THEIR EEOC CHARGES IN ORDER TO LATER COMPLAIN ABOUT THOSE ACTS IN FEDERAL COURT.

THE CIRCUITS ARE SPLIT AS TO WHETHER RETALIATION VICTIMS CAN BRING ACTIONS IN THE FEDERAL COURT AS TO ACTS THAT WOULD HAVE BEEN ENCOMPASSED WITHIN THE EEOC INVESTIGATION EVEN IF NOT SPECIFICALLY LISTED.

II.

THE TENTH CIRCUIT HAS OBVIATED APPLICATION OF F.R.E. 701 IN DISCRIMINATION/RETALIATION CASES SO THAT LONG-TERM EMPLOYEES CAN NO LONGER TESTIFY AS TO THEIR OPINION FROM DIRECT OBSERVATION OF DISCRIMINATORY AND RETALIATIORY PRACTICES.

III.

THE TENTH CIRCUIT IS NOW ERRONEOUSLY REQUIRING "SUBSTANTIAL EVIDENCE" OF PRETEXT BEFORE PERMITTING DISCRIMINATION AND RETALIATION CASES TO GO TO THE JURY. MERE SUSPICION OF MENDACITY PURSUANT TO *REEVES V. SANDERSON PLUMBING* WILL NO LONGER SUFFICE TO DEFEAT MOTIONS FOR SUMMARY JUDGMENT.

Conclusion 37

Appendices

Dalvit and Benjamin v. United Airlines, Inc. (10th Cir., Jan. 26, 2010). 1a

Dalvit and Benjamin v. United Airlines, Inc. (D.Colo. August 11, 2008) 40a

TABLE OF CITED AUTHORITIES

Page

Cases:

Bergene v. Salt River Project Agr. Imp. and Power Dist., 272 F.3d 1136 (9th Cir. 2001) 34

Bodett v. CoxCom, Inc., 366 F.3d 736 (9th Cir. 2004) 34

Cherry v. Ritenour School Dist., 361 F.3d 474 (8th Cir. 2004) 35

Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018 (9th Cir. 2006) 34

Fantini v. Salem State College, 557 F.3d 22 (1st Cir. 2009) 29

Godwin v. Hunt Wesson, Inc. 150 F.3d 1217 (9th Cir. 1998) 35

Gossett v. Oklahoma ex rel. Board of Regents for Langston University, 245 F.3d 1172 (10th Cir. 2001) 33

Jones v. United Parel Serv., Inc., 502 F.3d 1176 (10th Cir. 2007) 30

Manatt v. Bank of America, NA, 339 F.3d 792 (9th Cir. 2003) 34

TABLE OF AUTHORITIES--Continued

Martinez v. Potter, ... 28
347 F.3d 1208 (10th Cir. 2003

Mathirampuzha v. Potter, ... 29
F.3d 70 (2nd Cir. 2008)

Reeves v. Sanderson Plumbing, Inc., ... 34
530 U.S. 133, 120 S.Ct. 2097,
147 L.Ed.2d 105 (2000)

Stegall v. Citadel Broadcasting Co., ... 34
350 F.3d 1061 (9th Cir. 2003)

Weigel v. Baptist Hosp. of E. Tenn., ... 29
302 F.3d 367 (6th Cir. 2002)

Statutes:

28 U.S.C. § 1254(1). 1

42 U.S.C. § 2000e *et. seq.*. 1

Petitioners Dava Dalvit and Debra Benjamin ("petitioners") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was not reported, and is set forth at Appendix, pp. 3a-39a. The underlying opinion of the district court was not reported and is set forth at Appendix 40a-70a.

JURISDICTION

The decision of the court of appeals was entered on December 21, 2009. Petition for rehearing was denied January 26, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in pertinent part as follows:

> (a) Employer practices
> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

> with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . .
>
> It shall be an unlawful employment practice for an employer. . . to discriminate against any individual. . . . because he has opposed any practice made an unlawful employment practice by this title. . . .

STATEMENT OF THE CASE

A. Factual Background

Plaintiffs, both females, were management employees -- ramp supervisors -- for United Air Lines in Denver.

> PLAINTIFFS WERE ACCUSED OF WRONGDOING THAT WAS ALMOST IMMEDIATELY PROVEN FALSE AND YET SUSPENDED WITHOUT PAY FOR ABOUT ONE MONTH. MEN WERE NOT TREATED THE SAME UNDER IDENTICAL CIRCUMSTANCES.

Plaintiffs performed their jobs well for many years, among the few women working directly with the aircraft on the ramp. Nonetheless, on or about December 28, 2005, they were suspended without pay upon an accusation that they had been short-changing the company in their work hours, i.e. coming in late or

leaving early. It was Christmastime, and both plaintiffs were single parents.

An investigation was instigated by the ramp manager, Kevin Mortimer, who ordered a subordinate to obtain "badge histories" (i.e. clock-in and clock-out times) on plaintiffs. That documentation (which proved the plaintiffs innocent, as shall be discussed *infra*) was presented to an investigator summoned to Mortimer's office. "I showed them [the documents] to Kevin Mortimer. When I gave the documents to Jean Massey, we were in Kevin's office, it was Kevin, Jeannie, and myself. So I showed them to Kevin and Jeannie, and then left all the documents with Jeannie." Massey told Mortimer, however, that such an investigation would "open up a big can of worms."

Nonetheless, Mortimer instigated the investigation of plaintiffs, even though plaintiffs' own boss, James Nail, informed Mortimer that he had no facts supporting any assertion that plaintiffs had done anything wrong.

Despite Nail's statement that he had no evidence of wrongdoing, Nail was instructed by Mortimer to launch an investigation of plaintiffs anyway.

At the time, there were about 47 supervisors on the ramp, and only six females among them. Dalvit: "It has been very slow to change. Women are still believed by certain men to be bad luck on the ramp."

Benjamin: "We were suspended immediately without pay. Nothing like that could ever happen

without Kevin Mortimer commanding that it be done or approving that it be done. That was the history of Kevin Mortimer in Denver. He controlled every personnel action in all the time he was in Denver. It did not matter to him that we were single parents being suspended without pay at Christmas time."

Such opinion was patently based upon Benjamin's personal observations having worked at United since 1998. It was thus permissible as lay opinion testimony pursuant to F.R.E. 701.

The defense, from the outset of the case, misrepresented pivotal acts to the trial court. For example, the defendant asserted in its Answers to First Amended Complaints and in discovery responses that plaintiffs were "held out of service with pay." This was false. Plaintiffs were suspended for almost one full month -- at Christmastime -- without pay. Thus, the litigation unfolded based upon a false premise – until United's own documents proved the truth.

But Mortimer did more than merely direct that plaintiffs be investigated. The United investigator herself [Jean Massey] testified under oath that Mortimer then approved further adverse actions against plaintiffs -- removing them from their special assignments working on a special project at the airport -- the so-called FIT team.

As the alleged basis of their groundless suspension without pay, plaintiffs were shown documents -- sheets of "rings" -- which were printouts of their entrance

times and departure times to and from the airport -- which the corporation initially claimed proved plaintiffs had short-changed the corporation in their hours worked. This was the sole basis for Mortimer's approving their suspensions.

The "rings" themselves, sitting in front of Mortimer, proved that the accusations against plaintiffs were groundless. United Air Lines asserted to the U.S. Equal Employment Opportunity Commission that the requirement was that plaintiffs work 80 hours every two weeks [". . . but the expectation was that team members worked at least 80 hours in a two week pay period."]. Thus, the accusation against plaintiffs was false, and immediately shown to be so. The "rings" confirm that from November 26 through December 9, 2005, Plaintiff Benjamin worked 86.3 hours. Plaintiff Dalvit worked 93 hours.

Plaintiff Benjamin: "I explained to them that they were wrong. That we had worked the proper hours, but they refused to examine the evidence in their own hands. We were walked out [suspended] and Kevin approved it as a suspension without pay."

Plaintiff Dalvit: "I was handed a sheet of paper with 30 different rings in a month, a month's worth of the rings that they had pulled. And in calculating that, I had actually worked over the expected amount of time."

But the grounds for suspending plaintiffs for one month without pay were false for other reasons as well

(let alone that they did meet the requirement of working 80 hours every two weeks). Dalvit: "We were accused of leaving work early *on certain days* -- but we had been told that that was permitted. Our hours on the FIT team were flexible. We were instructed that we would be leaving early some days, working late on others. That was explained to us by Steve Nail from the very outset."

Nail instructed that, "there will be some days you'll work six hours; there will be some days you'll work twelve hours. And I'm okay with that as long as the job gets done."

The Minutes of the initial FIT team meeting confirm that the team members were expressly informed they could leave early and that hours would be flexible. [Handwritten Minutes of FIT team initial meeting on November 11, 2005 -- "Very flexible schedule -- no set time. . .. Some days longer...Some days shorter."].

Dalvit: "From the very outset, Kevin [Mortimer] and Jean [Massey] were informed what we were told when we joined the FIT team, that our hours were flexible. But Kevin suspended us anyway."

Indeed, male employees on Nail's team informed the United investigator that they were permitted to adjust their hours and to work "more or less hours in a day." This was pursuant to instructions from Nail himself, their manager.

Thus, plaintiffs were punished -- sent home without

pay -- for doing something that males were permitted to do with impunity.

Dalvit: "They had this information from the very first day, and we were cleared of any wrongdoing immediately. Yet Kevin Mortimer kept us off work without pay for four weeks at Christmas time."

The males who worked such flexible hours -- less than eight hours on some days -- were George Bellopatrick and Jeff Freitas, according to the United investigator, Massey, who also said that the two men never suffered any adverse consequences, in stark contrast to the punishments that plaintiffs received. Bellopatrick and Freitas never suffered any adverse consequences for working fewer hours even though management [Nail] was aware of it, according to the investigator, Massey.

Thus, men were not treated the same under identical circumstances (in the same unit at the same time). Another member of management, Denise VanDyke, observed (and testified in deposition) that men on plaintiffs' team left early and never got into trouble for it. VanDyke also testified in her deposition that men were not docked for being late, and she named the men who were late and never punished for it: Sam Ehmer, Mark Kinslow, Greg Morton, George Bellopatrick, John Darrow.

Benjamin: "An employee named Paul Fishler was investigated for leaving work early, and Jean Massey conducted the investigation. But he was not suspended without pay, like we were. And the

investigation was ultimately dropped with no discipline."

Under similar circumstances, plaintiffs had never heard of a male being held out of service without pay in all their years at United.

Benjamin: "What was disturbing is that Kevin [Mortimer] did not have the men investigated. They were leaving early and often, and he knew it. Steve Nail was well aware of it, and no one ever did a thing to the men. But it is characteristic of United that women on the ramp will get into trouble for almost anything but men will never even get their wrist slapped. Kevin Mortimer made this happen. He was decidedly anti-female. Remember that this was an old timer in the airlines industry. He had come from another airline and he was very set in his ways. He did not like women on the ramp."

Dalvit testified that all of the male members of the FIT team (also called the ROP team) left early without informing their supervisor (Nail).

Benjamin testified as to a lengthy list of males who left early, did not change or accurately enter their "cert" record [departure certification record] into the computer system and were never disciplined.

Thus, upon the summary judgment submissions, it was overwhelmingly evident that plaintiffs were treated disparately as compared to men by being sent home without pay at Christmas for a month -- on false charges. Most of these men were on the FIT team

with plaintiffs, working under the same supervisor, and therefore they were ideal comparators – and never disciplined for doing exactly what plaintiffs were accused of.

In sum, the roof was brought down on plaintiffs for actions (a) that were cleared and approved by their boss and (b) that the men on their team committed with impunity. Indeed, Nail himself informed Massey, the investigator selected by Mortimer, that his subordinates were working "longer hours and different hours, and they were flexing their time. . . . their hours start and stop times would change."

Benjamin: "If you are a woman at United, you have to always be watching what you are doing. It's a good old boy club and if you have one misstep management will come down on you, whereas the men get away with everything." Again, these were lay observations admissible pursuant to F.R.E. 701.

When plaintiffs were shown to be innocent of the original charges, Mortimer moved to alter the accusations against plaintiffs. He decided to claim -- or approved the accusation by the investigator -- that plaintiffs were culpable for "failure to respect the investigative process" (by asking other managers if they recalled the announced flexibility of their hours at the outset of the FIT team).

Dalvit: "That comment and that letter could never have been placed in our files without the approval of Kevin Mortimer. Nothing like that ever happened in the Denver ramp without Kevin's fingerprints being

all over it. What happened here is that Kevin was scrambling to try to make something -- anything -- stick. Finally, he had to give up and just try to get us for talking with the men on the team to see why they hadn't been treated the same as we were. But of course this was a false allegation also, because no one told us when we were told to go home that we couldn't talk with anyone else."

Indeed, plaintiffs were innocent of the new accusation. No one had ever told plaintiffs that what was eventually labeled an "investigation" was confidential. If it had been confidential, plaintiffs would have been required to sign a confidentiality document at the outset. Indeed, defendant's counsel possessed such a document, in blank, at one of the depositions. Plaintiffs were not asked to sign such a document.

Indeed, plaintiffs were never told it was an investigation in the first place or that it was secret.

But the plaintiffs were innocent of all accusations, and the investigator so testified. The United investigator [Massey] repeated again and again under oath that her investigation found no evidence of <u>any</u> violations <u>of rules, procedures or policies</u> of United Air Lines by plaintiffs.

Massey: "[W]e couldn't find anything to substantiate that they did anything wrong or violated any rule."

Ultimately, Mortimer himself had to admit in his

deposition that it was determined that nothing that plaintiffs had done broke any of United's rules.

Mortimer: "There were no rule violations determined during the course of the investigation."

Then why was all of this happening to plaintiffs? The reason is as follows: Plaintiffs had "challenged" Mortimer by immediately filing a claim of sex discrimination against him with United's Chicago headquarters. They filed their discrimination claims a few days after they were suspended, as will be discussed *infra*. They also complained of discrimination *immediately* to the manager assigned to investigate (Jean Massey).

Mortimer's reaction was immediate, violent and provable through the sworn testimony of a high-level manager who directly witnessed what Mortimer did next. Thus, Mortimer launched into tirades about plaintiffs' claims of discrimination -- tirades of retaliatory animus -- in closed-door meetings. United management employees who were present at such closed-door meetings had the courage to tell the truth in depositions about Mortimer's retaliatory comments, conduct and commands, as will be discussed *infra*.

MEN CONDUCTED THEMSELVES IN IDENTICAL FASHION AND YET WERE NEVER HELD OUT OF SERVICE, LET ALONE SENT HOME, WITHOUT PAY.

Benjamin: "In my years at United, men have been held out of service for investigations but invariably

they are held out *with* pay. But I never heard of any men held out of service for a pay certification issue, which is what happened to Deedee and me. I provided to United documents that showed that men on the FIT team [which was her own team] came late and left early and that their MARS calendars never reflected what they were actually working. I had documents that showed that men were repeatedly late -- and nothing ever happened to them. That's why Steve Nail ultimately had to admit that Deedee's and my pay certifications were never an issue, even though that's what Kevin Mortimer was claiming against us."

Note: As discussed *supra*, Mortimer reluctantly testified in deposition that, as it turned out, there was no evidence that plaintiffs had committed any wrongs with regard to pay certification (or anything else for that matter). Dalvit: "Kevin Mortimer knew this from the very outset, and still had us suspended and sent home without pay during the Christmas season -- for one month -- knowing that we were single mothers with no other source of income. . . . I went 30-some-odd days without having any income in my family." It was, said Benjamin, "the darkest period of my life. I thought I was going to go under and lose everything."

FELLOW MANAGERS TESTIFIED THAT MORTIMER WAS ANTI-FEMALE AND TREATED WOMEN WORSE THAN MEN.

Plaintiffs' perception that Mortimer was anti-female and treated them disparately was no aberration. Other managers, including those who still

work at United, observed the same thing. Larry Everett, who was a supervisor (a management position) attended the same meetings as plaintiffs did with Mortimer and observed Mortimer's conduct.

Everett testified that he observed that Mortimer and all of the operations managers (who were all men) treated women more harshly than men. Indeed, the women were yelled at by the males, and the men were not similarly victimized. In particular, Everett directly witnessed Mortimer treating women more harshly than men. Everett was so upset by Mortimer's inferior treatment of women that he had the courage to call Mortimer's attention to it. Upon leaving a particular meeting, Everett told Mortimer, referring to his mistreatment of women, "That's just wrong." Mortimer responded, "They'll get over it." *Id.* Plaintiffs were present during the meetings that Everett referred to.

Dalvit: "United used to be all male, and women were not allowed to work on the ramp. The old school managers who have been in the industry a long time still think that women are bad luck on the ramp, and they don't want women out there. Kevin Mortimer made no bones about. He hated women on the ramp, and anyone could see it in his day-to-day treatment of any women under his thumb." Thus, Dalvit testified pursuant to F.R.E. Rule 701 regarding her own observations of Mortimer's anti-female conduct.

STILL OTHER MANAGERS (WHO STILL WORK FOR UNITED) OBSERVED THE SAME MISTREATMENT OF

WOMEN BY MORTIMER.

In this litigation, many present United managers testified in deposition – unwillingly – about Mortimer's (their own manager's) mistreatment of women before their own eyes. VanDyke observed Mortimer's treatment of women in an inferior fashion as compared to men for well over a year. During that time, she had actual interaction with, and observation of, him. Her testimony was thus wholly admissible pursuant to F.R.E. 701.

ANOTHER HIGH-LEVEL OPERATING MANAGER COMPLAINED DIRECTLY TO MORTIMER ABOUT TREATING WOMEN AS INFERIORS.

Rhonda Patterson-Eachus, who rose to the level of operations manager, one of only a few females in that high position in United's history in Denver, complained directly to Mortimer about his disparately worse treatment of women. Patterson-Eachus (who still works for United today) testified under oath that she directly observed that Mortimer treated men and women differently. Again, such opinion testimony is wholly admissible pursuant to F.R.E. 701 when based upon the personal observation of the witness.

MORTIMER STATED HIS BELIEF THAT WOMEN SHOULD BE "HOME, BAREFOOT AND PREGNANT, IN THE KITCHEN." HE WAS NOT JOKING.

Mortimer was an open sexist. He announced

(seriously) in October 2005 that, "Women belong at home, barefoot and pregnant, in the kitchen."

PLAINTIFFS WERE CLEARED OF ANY AND ALL WRONGDOING.

United had enough information on the very first day to clear plaintiffs, but plaintiffs were suspended without pay for nearly a month. Thus, it was no surprise that after nearly one month of being suspended without pay, the investigation resulted in "no finding, nothing founded" against plaintiffs. This was according to one of the highest level managers in the Denver hub, Patterson-Eachus.

The United investigator herself [Massey] testified under oath that as to the accusations against plaintiff that had gotten them suspended from work without pay (unlike males who had done the same thing but not been punished), "[W]e didn't find anything to substantiate a claim." Massey was unequivocal in reiterating under oath that her investigation found no evidence of wrongdoing by plaintiffs. [Q. Did you find indications or evidence of any wrongdoing by them [plaintiffs]? A. No.]. And the investigator repeated under oath that her investigation found no evidence of any violations of rules, procedures or policies of United Air Lines by plaintiffs. "[W]e couldn't find anything to substantiate that they did anything wrong or violated any rule."

Thus, the investigator [Massey] testified that no disciplinary action of any kind was found to be appropriate.

Even Mortimer, although jousting in his deposition, had to admit that neither he nor anyone else had any evidence that plaintiffs had not lived up to expectations of management.

Indeed, Mortimer reluctantly admitted under oath that with regard to the pertinent topics of the investigation, "she [the investigator] didn't say anything negative about them [plaintiffs]."

MORTIMER TOOK ADVERSE ACTION AGAINST PLAINTIFFS ANYWAY, EVEN THOUGH THEY HAD BEEN CLEARED OF WRONGDOING.

Even after plaintiffs returned from their groundless and unduly extended suspension without pay, Mortimer continued the disparate treatment. He promptly had plaintiffs removed from their special assignment, the FIT team. It was Mortimer who approved that action (the United investigator herself testified under oath that it was Mortimer who approved plaintiffs being removed from their team).

According to Mortimer, the rationale for removing plaintiffs from the FIT team upon their return from suspension was that there was an issue of "credibility." At first in his deposition, Mortimer claimed he did not know the reason for removing plaintiffs from the FIT team. But then, in reversing himself, Mortimer claimed that there were "credibility issues as members of management."

However, Mortimer wouldn't be pinned down on the basis of the alleged "credibility issues." Either he couldn't remember or he had no specifics. Mortimer's perception of "credibility issues" was perfectly subjective and perfectly pretextual under discrimination/retaliation analysis. This is particularly so since Mortimer suffered such a memory loss.

SINCE PLAINTIFFS WERE CLEARED OF ANY AND ALL VIOLATIONS OF UNITED RULES, POLICIES AND PROCEDURES, THE MOTIVATION FOR PUNISHING THEM WAS EXPOSED: RETALIATION (WHICH MORTIMER HAD THE TEMERITY TO ANNOUNCE IN A SECRET MEETING).

A few days after plaintiffs were suspended from work and sent home without pay, they had the courage to file a formal complaint of discrimination with United's headquarters in Chicago. Indeed, a senior HR manager confirmed that plaintiffs had complained about discrimination to HR in Chicago.

Plaintiff Benjamin informed United that she was going to obtain a lawyer. Astoundingly, United's HR department in Chicago told Plaintiff Benjamin "that she couldn't have legal representation." She was thus "incorrectly advised," another HR employee testified in this litigation.

Dalvit testified that immediately after she complained about discrimination to United's HR

Department in Chicago, Mortimer's already bad treatment worsened: "[H]e wouldn't even acknowledge me in the hallway, he wouldn't acknowledge my presence." This being treated like a *persona non grata* made Plaintiff Dalvit's further advancement in the company impossible.

Plaintiff Benjamin testified that she, too, was treated by Mortimer as if she was nonexistent once she complained about discrimination.

Mortimer testified that he was well aware of plaintiffs complaint to United headquarters in Chicago about harassment and discrimination; he believed he was informed shortly after plaintiffs registered their complaint. Thus, within a few days of plaintiffs' suspension without pay, Mortimer was aware that they had complained about discrimination to Chicago.

Patterson-Eachus testified that Mortimer was aware of plaintiffs' claim of sex discrimination and informed his subordinates at a staff meeting. A lower-level manager informed Mortimer of plaintiffs' claims of discrimination to Chicago when the lower-level manager got a telephone call from United headquarters in Chicago about it. [Q. Did you mention to Kevin Mortimer that you had received a call from HR in Chicago? A. That's why I went to Kevin's office, and I mentioned to him that call. . . ."].

Astoundingly, Mortimer told the lower-level manager [Nail] "to disregard that call . . . ."

Mortimer then set in motion a course of retaliation

for plaintiffs' complaints of sex discrimination to Chicago that was exposed by another high-level manager who listened to him in the same closed-door meetings and testified truthfully in deposition, as will be discussed *infra*.

PLAINTIFFS WERE THEN SUBJECTED TO A COURSE OF DISCRIMINATION AND RETALIATION THAT ENDED THEIR CAREERS AT UNITED -- ALL ENGINEERED BY MORTIMER. HE AS MUCH AS ADMITTED SUCH BEHIND CLOSED DOORS.

COURAGEOUS TESTIMONY BY HIGH-LEVEL MANAGERS EXPOSED DISCUSSIONS IN SECRET MEETINGS AND MORTIMER'S OVERT STATEMENTS OF RETALIATORY ANIMUS. SUMMARY JUDGMENT SHOULD HAVE BEEN OBVIATED BY THIS EVIDENCE ALONE.

Rhonda Patterson-Eachus became plaintiffs' supervisor upon their return from suspension. However, Mortimer ordered that their return would be attended by "stipulations" including an "action plan," according to Patterson-Eachus.

Demonstrating that Mortimer's own testimony could not be believed and that mendacity has been demonstrated in this case beyond any doubt, Mortimer denied knowing anything about the action plan *that he commanded to be created*. Mortimer testified that he had no idea why an action plan was discussed for plaintiffs. Indeed, Mortimer testified that he had no knowledge of any information that could form the basis of an action plan.

Nonetheless, Patterson-Eachus testified under oath that she was instructed by Mortimer to prepare an "action plan" for plaintiffs, and give it to Mortimer. It set forth some "extremely stringent" guidelines for plaintiffs, and "Debbie and Deedee were successful in meeting their action plan," according to Patterson-Eachus They were both "effective" supervisors.

More tellingly yet, Mortimer focused at secret staff meetings (plural) upon plaintiffs' complaints of discrimination and told his subordinates to be careful in their dealings with plaintiffs and to document everything.

Then Mortimer ordered that plaintiffs were not allowed to become shift supervisors. This was according to the deposition testimony of Patterson-Eachus herself.

Furthermore, Mortimer commanded Patterson-Eachus that Plaintiff Dalvit "will not be moved to days [desirable day shifts], she will remain on swings [undesirable swing shifts], and she will not be used as

a shift supervisor."

Mortimer told Patterson-Eachus that Plaintiff Dalvit could not "ever" move back to day shift or become shift supervisor. This meant the end of Plaintiff Dalvit's career, at least within Mortimer's department, according to Patterson-Eachus.

In some of the most striking "smoking gun" testimony likely to be heard in a retaliation case, Patterson-Eachus testified that she heard Mortimer explain why he was taking the above adverse actions against plaintiffs. As to Plaintiff Dalvit, Mortimer said, "I hate her." He also said his actions against plaintiffs were because "he was unhappy because of the discrimination. . . ." By that, Mortimer expressed being unhappy with plaintiffs' discrimination "complaint." Mortimer specifically referred to plaintiffs' complaint of discrimination, their complaint that plaintiffs were not being treated the same as male coworkers.

Mortimer then cemented his vindictive orders against plaintiffs, commanding (to his assembled managers behind closed doors) that plaintiffs "would not be changing shifts." He also told participants in one management meeting, "when they come back from their suspension, they would not be receiving any favors. . . ."

Patterson-Eachus came to plaintiffs' defense, but Mortimer said "that we would not be doing anything to help either one of them [Dalvit and Benjamin]." This and other statements discussed *supra* constitute

smoking gun statements of retaliatory animus, the strongest form of evidence in retaliation law.

A "LETTER OF COUNSEL" WAS THEN PLACED IN PLAINTIFFS' FILES; IT CONSTITUTES AN ADVERSE EMPLOYMENT ACTION THAT MUST BE DISCLOSED FOR FIVE YEARS WHENEVER THEY APPLY FOR PROMOTIONS.

Mortimer then informed other managers that there was a letter placed in plaintiffs' files -- "a letter of counsel," according to an HR manager [Nelli], who saw the file. A "letter of counsel" is "to change behavior prior to discipline." It was Mortimer himself who told Nelli about it.

The letter was to remain in the plaintiffs' files for five years, a United HR's representative testified. She testified that "it would be on record, and it could then lead into a form of discipline. . . ."

But Mortimer then expanded the impact of the letter. He point-blank informed plaintiffs that for the next five years they would be "on discipline."

Furthermore, Mortimer informed plaintiffs that they would be required to report the above-described *discipline* anytime they applied for a new job, reassignment or promotion.

Mortimer informed plaintiffs that for the next five

years, if they self-nominated for job openings, they would have to report on the application form that they were on discipline.

Benjamin: "That was the end of our careers. That letter ensured that we would never get another position or another promotion or another transfer at United. That was like branding someone." According to a top manager for United, such a letter of discipline was fatal.

BUT MORTIMER DID NOT STOP THERE. HE TOOK FURTHER ADVERSE ACTIONS AGAINST PLAINTIFFS UPON THEIR RETURN FROM SUSPENSION.

Upon their return from suspension, plaintiffs were involuntarily removed from the FIT team. Being on the FIT team was a step forward for advancement in the company. It was a special position that was a "feather in your cap." Mortimer told subordinates that being placed on the FIT team could be "very good for your career." Being removed from the FIT team was a career setback -- a blemish that would halt your career "until years went by and everyone who knew about it was gone." Being on the FIT team "was going to be good on your resume," but being removed from it was a punishment.

After plaintiffs were removed from the FIT team, three males were added: Paul Jellison, Ed Nazarenus and Rich Dolin. This is deducible from the testimony of a member of the team, Bellopatrick, who listed the

later team members. Plaintiffs' duties were performed after their removal by Bellopatrick and another male, Freitas. The FIT team supervisor testified that the first two replacements after plaintiffs were removed from the FIT team were Paul Jellison and Paul Moris. Both Jellison and Moris are males.

MORTIMER TOOK STILL FURTHER ADVERSE ACTIONS AGAINST PLAINTIFFS UPON THEIR RETURN FROM SUSPENSION.

Mortimer then instructed plaintiffs' supervisor to prepare a false performance appraisal, as admitted by the supervisor herself in her deposition. At a time when Patterson-Eachus, as plaintiffs' supervisor, was to prepare performance evaluations for plaintiffs, Mortimer instructed her as to what to put into them, namely "Needs Improvement." Even though Patterson-Eachus did not believe plaintiffs deserved it, Mortimer directed Patterson-Eachus to put the unfair "needs improvement" assessment into their performance evaluations.

Mortimer never gave any reason for instructing Patterson-Eachus to falsely downgrade plaintiffs' performance evaluations.

Further raising significant credibility issues, Mortimer testified in his depositions that he did not provide any input into plaintiffs' performance evaluations, directly contradicting Patterson-Eachus. Thus, Mortimer was, again, grossly forgetful.

The inferior performance evaluations directly and negatively impacted plaintiffs' salary increases at the end of the year.

MORTIMER TOOK STILL OTHER DISCRIMINATORY AND RETALIATORY ACTIONS AGAINST PLAINTIFFS.

Debra Benjamin was then removed from her shift supervisor job and a male named Sean Huster placed into it.

Plaintiffs were then expressly – and secretly – banned by Mortimer from ever becoming shift supervisors again. This was overheard by Operations Manager Patterson-Eachus, that plaintiffs were not allowed to become shift supervisors.

The only other female on the FIT team -- Denise Ambrose (now VanDyke) -- also was removed from the FIT team. This, too, was "directed by Kevin [Mortimer]," according to the head of the FIT team himself (Nail). VanDyke was then moved to swing shift, an undesirable shift; she was told by her boss, the operating manager (Nail), that this was because of her mere association with Plaintiffs Dalvit and Benjamin. Again, VanDyke's movement to the undesirable swing shift was Mortimer's doing.

Plaintiffs applied for numerous jobs and were not allowed to be promoted or transferred. Dalvit: "And I never heard anything from anybody in the company about any position that I've ever applied for." All of

those job openings were filled, and Plaintiff Dalvit was aware of the qualifications of the persons who filled them. Plaintiff was equally as qualified, "If not more." Note: Among the many jobs for which Plaintiff Dalvit applied were nine department head positions for which she was qualified -- but she never got any meaningful response.

Plaintiff Benjamin applied for a zone controller job, for which she was qualified, and did not even get an interview. The person to whom she applied, Bill Aplin, told plaintiff that Mortimer told him not to consider plaintiff for the position "because I was on an action plan." This confirmed the deleterious effect of an action plan on one's career at United.

Not only was Plaintiff Dalvit not considered for transfer or promotion, she was not considered for movement off the undesirable swing shift. This was despite the fact that many men had had their shift requests honored. Plaintiff Dalvit then applied for a hardship shift change, but Mortimer turned that down also.

Plaintiff Dalvit was then sent to be fueling supervisor, an unwanted job, "the only female that's ever been sent to be a fueling supervisor in the last 15 years or more." She was placed in that job "because either, one, they thought I would quit or, two, I would fail at it. And I didn't fail at it. And I didn't quit at it." She was assigned to the fueling position with no prior experience whereas men assigned there had worked in fueling before. Of course Plaintiff Dalvit was removed from her shift supervisor job.

Plaintiff Benjamin, too, was then involuntarily removed from her job as permanent shift supervisor even as she was requesting different assignments. In her deposition, Plaintiff Benjamin set forth the names of many men in comparable positions who received special consideration of their requests for reassignment, and she described the details of each act of preferential treatment.

Under the above circumstances, it is objectively evident that plaintiffs' careers at United Air Lines were at an end -- because they were females who dared to complain about sex discrimination by Kevin Mortimer.

B. Decision of the Court of Appeals

The Tenth Circuit ruled, in pertinent part, that the trial court did not have jurisdiction to consider most of the actions taken by Mortimer and United Air Lines against plaintiffs because said actions were not expressly listed in plaintiffs' charge of discrimination/retaliation to the EEOC.

The Tenth Circuit also ruled, in pertinent part, that plaintiffs' direct observations after many years working on the ramp at United Air Lines were inadmissible, and that plaintiffs' affidavits and deposition testimony were properly struck by the trial court. Thus, all of plaintiffs' eyewitness and ear-witness testimony was either struck or discounted to zero.

The Tenth Circuit ruled, in pertinent part, that plaintiffs had not adduced evidence of pretext.

REASONS FOR GRANTING THE PETITION

I.

THE CIRCUITS ARE SPLIT AS TO WHETHER RETALIATION COMPLAINANTS ARE REQUIRED TO LIST EACH SPECIFIC EMPLOYER ACT AGAINST THEM IN THEIR EEOC CHARGES IN ORDER TO LATER COMPLAIN ABOUT THOSE SPECIFIC ACTS IN FEDERAL COURT.

THE CIRCUITS ARE SPLIT AS TO WHETHER RETALIATION VICTIMS CAN BRING ACTIONS IN THE FEDERAL COURT AS TO ACTS THAT WOULD HAVE BEEN ENCOMPASSED WITHIN THE EEOC INVESTIGATION EVEN IF NOT SPECIFICALLY LISTED.

The Tenth Circuit ruled in blanket fashion that plaintiffs had not exhausted their administrative remedies with regard to a majority of the adverse actions taken against them by Mortimer and United Air Lines, as described *supra*. In so ruling, the Tenth Court applied its announced rule that, "each discrete incident of [retaliatory] treatment constitutes its own unlawful employment practice for which administrative remedies must be exhausted." [*citing Martinez v. Potter,* 347 F.3d 1208, 1210 (10th Cir. 2003]. *supra*, Appendix 14a-15a.

Other Circuits have retained the old rule, i.e. that a discrimination victim can bring into court not only those acts expressly set forth in the EEOC charge, but also those acts that would have been exposed in the EEOC's naturally-ensuing investigation. *See, Fantini v. Salem State College*, 557 F.3d 22, 27 (1st Cir. 2009); *Mathirampuzha v. Potter*, 548 F.3d 70, 76 (2nd Cir. 2008); *Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 380 (6th Cir. 2002). Indeed, the Sixth Circuit has ruled that, "where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." *Id.*

In the instant case, plaintiffs' EEOC charge was expansive in checking "retaliation" and in listing multiple actions against them (all of which were directed by Mortimer, as discussed *supra*):

> On December 28, 2005, I was suspended from my job as a ramp supervisor on special assignment and later removed from the special assignment as a punishment. I was then placed on probation, and later a disciplinary letter was placed in my file, which has the effect of continuing me on probation and affecting my employment for five years. In addition the company has docked our pay for leaving work early, treating us like hourly non-exempt employee. . . .

As recently as 2007, the Tenth Circuit reiterated its former rule that victims could sue on employer actions against them even if not expressly set forth in the EEOC charge so long as those employer actions would naturally have turned up in the EEOC investigation that would have been triggered by the EEOC charge. *See, Jones v. United Parcel Serv., Inc.*, 502 F.3d 1176, 1183 (10th Cir. 2007). Indeed, said rule was repeated in this case, at Appendix p. 14a.

However, exposing the split of authority even within the Tenth Circuit, the appellate court in the instant case then applied the contrary and contradictory rule that "each discrete incident of [retaliatory] treatment constitutes its own unlawful employment practice for which administrative remedies must be exhausted." *Id.*

Again, this new rule directly contradicts ample case law from the Tenth and other Circuits, as discussed *supra*.

There is an expanding pattern throughout the land of limiting the access of victims of discrimination and retaliation to the federal courts. This is no doubt because of the crush of such cases in the federal court. The Tenth Circuit has been especially active in seizing upon novel legal devices to grant summary judgment, and the above is one of them.

If the Tenth Circuit ruling in this case is not overturned, it will be cited hereafter throughout the land, and victims of discrimination and retaliation will be further constrained to list every minor action

against them in their EEOC charges. Their access to the federal courts will be further eroded.

It is important to note that this new Tenth Circuit rule for retaliation cases whipsaws victims between it and another rule of law that the Tenth Circuit has previously invoked to grant summary judgment in hundreds of cases. That rule limits the definition of "adverse action" about which victims are permitted to complaint to the EEOC in the first place. The Tenth Circuit has severely carved down what constitutes an "adverse action", ruling that most adverse actions short of demotion or termination, or that don't have a concrete impact upon compensation, are too insignificant to bother with under federal discrimination laws.

Moreover, the Tenth Circuit, and other courts, have evolved an analytical method in which they try to strike each individual adverse action by the employer, one by one, without considering them within the context of the entire array of actions against the victim. That is precisely what the Tenth Circuit did in the instant case.

In the instant case, and given the breadth of the EEOC charges, there can be no doubt that the EEOC's investigation would have reached and exposed all of Mortimer's actions as described herein. Indeed, they were EEOC charges of, not just discrimination, but retaliation, which highlighted a plethora of retaliatory acts (all by Mortimer). Moreover, the array of actions by Mortimer was not confined to the past tense. Plaintiffs also highlighted the impact upon their

careers into the future – as well as the impact of past events upon future events. ["I was then placed on probation, and later a disciplinary letter was placed in my file, which has the effect of continuing me on probation and affecting my employment for five years."].

Again, as a matter of either plain or legal logic, the EEOC charge would have naturally produced an investigation of all of the retaliatory acts by Mortimer including the multiple impacts of the five years of probation. The Tenth Circuit's new rule would obviate said former test and require that each "discrete act" be listed in the EEOC charge.

II.

THE TENTH CIRCUIT HAS OBVIATED APPLICATION OF F.R.E. 701 IN DISCRIMINATION/RETALIATION CASES.

Among the new legal devices that the Tenth Circuit is employing to dismiss discrimination/retaliation cases – and no other kinds of cases – is to ignore the application of F.R.E. 701 to discrimination cases. Thus, the Tenth Circuit in this case affirmed the striking of plaintiffs' entire affidavits in opposition to summary judgment, finding that they contained "conclusory, unsubstantiated statements."

F.R.E. 701 authorizes the testimony of a lay witness "in the form of opinions or inferences" that

"are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *See, Gossett v. Oklahoma ex rel. Board of Regents for Langston University*, 245 F.3d 1172, 1179 (10th Cir. 2001).

Yet, the Tenth Circuit is now obviating that rule of law in discrimination cases, even when the victims of discrimination have observed the employer's practices first-hand for years.

III.

THE TENTH CIRCUIT IS NOW ERRONEOUSLY REQUIRING "SUBSTANTIAL EVIDENCE" OF PRETEXT BEFORE PERMITTING DISCRIMINATION CASES TO GO TO THE JURY.

This petition presents intertwined issues (e.g. limitation on scope of the EEOC charge, and application of F.R.E. 701) to eliminate valid discrimination/retaliation cases -- against a backdrop in which it is patent that the trial court viewed most of the summary judgment evidence in a light most favorable to the non-movant, in violation of Rule 56 summary judgment procedure. The Tenth Circuit implicitly and/or expressly approved said analysis, and did so in a particularly egregious case of retaliation involving rare "smoking gun" statements

of retaliatory animus by Mortimer himself, witnessed by his most senior managers behind closed doors.

Thus, the trend in the Tenth Circuit is to delimit or ignore powerful evidence (and also reasonable inferences therefrom) related to the analysis of pretext, as approved by *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The trend demonstrates increasingly divergent opinions of the Circuits and the encroachment of a new and tougher standard for proof of pretext solely for discrimination and retaliation victims. It is not the same standard that applies to other civil cases involving circumstantial evidence. The opinion below conflicts with this Court's prior decisions and represents a *de facto* new standard when circumstantial evidence of pretext is presented in discrimination/retaliation cases.

Likewise, the Eight and Ninth Circuits have taken the same path, to the extreme, with a heightened level of evidentiary proof being required to show pretext -- but only in discrimination cases. Said Circuits have established a standard that a showing of pretext can be made only by direct evidence or by "specific and substantial" or "substantial" circumstantial evidence. *See, Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1029 (9th Cir. 2006); *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 743 (9th Cir. 2004); *Manatt v. Bank of America, NA*, 339 F.3d 792, 803 (9th Cir. 2003); *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003); *Bergene v. Salt River Project Agr. Imp. and Power Dist.*, 272 F.3d 1136, 1142, (9th Cir.

2001); *Godwin v. Hunt Wesson, Inc.* 150 F.3d 1217, 1222 (9th Cir. 1998); *Cherry v. Ritenour School Dist.*, 361 F.3d 474, 479 (8th Cir. 2004).

In the seminal case of *Godwin, supra*, at 1222, the Ninth Circuit established its own new evidentiary standard, thereafter followed in scores of lower court cases, as follows:

> In those cases where direct evidence is unavailable, however, the plaintiff may come forward with circumstantial evidence that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable. Such evidence of "pretense" must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate on the basis of sex. [emphasis added].

Other courts, including the Tenth Circuit, have implicitly adopted such a higher level of circumstantial evidence of pretext required in discrimination/retaliation cases, as in the instant case. Thus, plaintiffs herein presented significant, multi-pronged evidence of pretext -- including "smoking gun" statements of retaliatory animus (by Mortimer himself) -- only to have the trial court and Tenth Circuit discount it totally by use of certain new legal analytical devices, as discussed *supra*.

This line of cases and the decision in the instant case run contrary to the requirements of *Reeves, supra*, that questions of fact are to be approached the same in discrimination cases as in other cases. *See, Reeves*, at 148.

This trend and the instant case erode this Court's rule of law reiterated in *Reeves, supra*, that even the mere suspicion of mendacity will suffice to show pretext. *See, Reeves*, at 147. Such a clearly enunciated standard has been eroded among certain Circuits, including the Tenth. The new legal standard, used to scythe hundreds of cases out of federal court, is to require, either expressly or implicitly, that pretext may be shown only by "substantial" evidence and without any F.R.E. 701 evidence to be considered.

Such a new and toughened standard also cuts against the reality of discrimination/retaliation cases, in which "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *See, Reeves*, at 141. Such questions are "sensitive and difficult." *Id.*

They do not deserve a tougher analytical standard across the nation.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 21, 2010

APPENDIX

APPPENDIX A

[Filed January 26, 2010]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVA DALVIT and DEBRA BENJAMIN, *Plaintiffs-Appellants,*	)	No. 08-1283
	)	D.C. Nos.
v.	)	1:07-CV-725
	)	1:07-CV-726
UNITED AIRLINES, INC. *Defendant-Appellee.*	)	

ORDER

Before TACHA, MURPHY, and HARTZ, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing on en banc was transmitted to the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the curt requested that the court be polled, that petition is also denied.

Entered for the Court
Elisabeth A. Shumaker, Clerk

APPPENDIX B

NOT SELECTED FOR PUBLICATION

[Filed December 21, 2009]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVA DALVIT and DEBRA BENJAMIN, *Plaintiffs-Appellants*, v. UNITED AIRLINES, INC. *Defendant-Appellee*.	))))))))	No. 08-1283 D.C. Nos. 1:07-CV-725 1:07-CV-726

ORDER AND JUDGMENT*•

• This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before TACHA, MURPHY, and HARTZ, Circuit Judges.

Plaintiffs Dava Dalvit and Debra Benjamin sued United Air Lines, Inc. (UAL) asserting discrimination and retaliation claims under a variety of federal and state statutes. The district court granted summary judgment in favor of UAL on all of their claims. Plaintiffs now appeal the grant of summary judgment on their discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. We affirm.

BACKGROUND

1. Organization of the FIT Team

Plaintiffs worked as ramp supervisors at UAL's facility at Denver International Airport (DIA). Ramp supervisors were responsible for various tasks associated with ensuring the on-time departure of aircraft. They reported to Operating Managers, who reported to Department Managers, who reported in turn to the Station Manager.

Ramp supervisors were responsible for working an eight-hour day and for certifying their hours worked using an automated "pay certification" process. [FN1] If they left early before completing an eight-hour day, they were required to inform an Operating Manager before leaving. For hourly exceptions such as arriving late or leaving early, they were expected to handwrite the exceptions on their pay certifications. There is some question about how strictly the pay

certification process was enforced. While UAL's policies do not permit supervisors to certify that they have worked an eight-hour day when they have not done so, plaintiffs assert that male supervisors did so at times without penalty.

In late 2005, UAL began assembling a temporary "FIT Team" at DIA. As initially constituted, the FIT Team included three women-both plaintiffs and one other female ramp supervisor-and three male ramp supervisors. The purpose of the FIT Team, whose initials stood for "fix, improve, transform," was to improve performance on the ramp.[FN2] Appointment to the FIT Team was not considered a promotion, but Kevin Mortimer, UAL's Department Manager of Ramp Services, did tell at least one member of the FIT Team that it would be advantageous to his career development to be part of the team.

The FIT Team met for the first time on November 28, 2005. At this meeting, Steve Nail, who was overseeing the team, set out his expectations concerning working hours for team members. He stated that there would not be any pre-determined start or finish times for their shifts, and that team members could work a flexible schedule, with some days shorter than eight hours, and some days longer, so long as they completed all their required tasks. Team members were, however, required to keep him informed as to what shifts they would be working.

Plaintiff Benjamin asked Nail, in light of their flexible hours, how FIT Team members were supposed to "cert" their time. He said he would get clarification for her on that issue, but he never did. Benjamin admits that while working as a member of

the FIT Team, she turned in pay certifications showing that she had worked eight hours on some days when she had not. Pay certification was complicated by the fact that the certification schedules were no longer handwritten and she couldn't write in her actual time on the certifications as she had previously done. Instead, Benjamin kept a log of her actual hours on the computer. She did not provide this log to management.

Plaintiff Dalvit testified that while she was on the FIT Team, work start times were flexible and sometimes she left early. She did not tell anyone on occasions when she left early. As she understood it, communication about leaving early was not expected of Team members.

2. Initial Investigation of Plaintiffs' Time Certifications

In December 2005, shortly after the FIT Team was assembled, two Operating Managers, Steve Peters and Terry Schenck, expressed concern to Nail that plaintiffs may not have been working full, eight-hour shifts. Nail asked if the men had any evidence. They replied that they did not.

Around the same time, Nail assigned plaintiffs to attend a 5:00 a .m. briefing to explain the purpose of the FIT Team to other supervisory employees. When Nail later asked Peters how the briefing had gone, Peters had no idea what he was talking about. He told Nail that plaintiffs had not attended the briefing and had not discussed the FIT Team as ordered.

Nail took his concerns about plaintiffs' attendance to his immediate supervisor, Mortimer, and asked him for guidance on how to deal with the situation. Mortimer told Nail to check plaintiffs' "badge histories" to see what they showed about their attendance. Nail obtained from the City and County of Denver records showing plaintiffs' entry and exits from the secure areas of DIA and their entries and exits from the employee parking lots at DIA (referred to in the record as plaintiffs' "rings"). He then prepared spreadsheets using these records summarizing plaintiffs' access card use for December 2005. The records and spreadsheets revealed that plaintiffs had failed to work an eight-hour day on some of the days they had certified that they had worked eight hours.

Armed with these records and spreadsheets, Mortimer approached James Kyte, UAL's Station Manager at DIA, and asked him for advice. Kyte determined that an investigation was warranted. He selected Jean Massey, Department Manager of Facilities and Ground Equipment Maintenance, a department completely separate from Ramp Services, to conduct the investigation. He felt that Massey would bring an unbiased perspective to the situation.

3. Massey's Investigation

Massey examined the plaintiffs' DIA rings and the spreadsheets Nail had prepared. On December 28, 2005, Massey and Nail met separately with each plaintiff to discuss the investigation. Massey advised plaintiffs that she was conducting an investigation into discrepancies between the hours recorded on their pay certifications and their arrival and

departure records. She showed them their DIA rings. Plaintiff Dalvit responded that they were part of a special assignment team and had flexible hours. Massey replied that she was not concerned about the days when plaintiffs worked late, only the days when they went home early but turned in certifications showing that they had worked a full day.

Massey then confiscated plaintiffs' access badges and sent them home. The decision to send plaintiffs home was Massey's. Massey later told plaintiffs they could submit information to her to be considered as part of the investigation.

The investigation continued. Massey discussed the problem of hours for FIT Team members with Nail. He told her that he had told members of the Team that they would have flexible hours but that they were to work eight and a half hours each day. Massey spoke to other Team members. They told her that they understood from Nail's directives that they were allowed to work more or fewer hours in a day than an eight-hour shift. While Massey was conducting her investigation, plaintiffs contacted other FIT Team members to obtain statements from them about the Team's flexible work schedules.

4. Plaintiffs' Complaint of Sex Discrimination

After they were suspended, plaintiffs contacted Gary Thomas, a human resources generalist at UAL's Chicago headquarters. They complained that their suspension was discriminatory. Jeanne Nelli of Human Resources (HR) volunteered to come to Denver to conduct an investigation. But plaintiffs never followed through by filing a formal complaint

of discrimination with UAL; as a result, Nelli ceased her investigatory efforts.

5. Results of the Investigation

On January 18, 2006, Massey and Mortimer met with plaintiffs. During this meeting, Massey gave plaintiffs formal Letters of Counsel that summarized her findings. In the Letters of Counsel, she stated that there was insufficient evidence to conclude that either plaintiff had falsified company records. But she further stated that plaintiffs' conduct during their assignment to the FIT Team and during the investigation had caused Massey to question their leadership abilities at UAL. She had two concerns. First, plaintiffs had left early on numerous occasions without obtaining authorization from an Operating Manager. Second, they had failed to "respect the investigative process" by "call[ing] other supervisors to solicit statements from them." Aplt.App., Vol. II at 215, 217.

Massey's letters informed plaintiffs that UAL was taking the following actions against them. First, they would be removed from the FIT Team and returned to the shifts they were on prior to their participation in the Team. Second, they were to be placed on a ninety-day action plan. The letters warned them that "[f]ailure to successfully meet the expectations outlined in that action plan will lead to discipline up to and including discharge." *Id.* In addition, the Letters of Counsel would remain in plaintiffs' personnel files for five years and would have to be disclosed when they applied for other positions within UAL. When plaintiffs returned to work on January 23, 2006, they were paid in full for the time they were held out of service. After pursuing their

administrative remedies with the Equal Employment Opportunity Commission (EEOC), they filed this suit.

ANALYSIS

1. Bankruptcy Discharge

At the outset, we are confronted with UAL's argument that since all of plaintiffs' claims were discharged by the 2006 confirmation of its Chapter 11 bankruptcy in the Northern District of Illinois, the district court lacked subject-matter jurisdiction to entertain the claims on the merits.[FN3] Although the parties devoted nearly 400 pages of district court briefing and exhibits to the bankruptcy discharge issue, the district court dismissed UAL's argument in a footnote, stating that it was not persuaded by the argument. It concluded that it had jurisdiction to address the merits of UAL's summary judgment motion. Aplt.App., Vol. XII at 1364 n. 1.

In our view, the bankruptcy discharge issue is far from simple.[FN4] To begin with, it remains an open question whether such a discharge operates as a jurisdictional bar to suit or is merely an affirmative defense that can be waived.[FN5] If the discharge is jurisdictional, fundamental adjudicative principles required the district court to resolve the discharge issue before proceeding to the merits of plaintiffs' Title VII claims. *See generally Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (holding federal court may not decide cause of action before resolving existence of Article III jurisdiction). To further complicate matters, even assuming that such a discharge was jurisdictional, factual issues remain concerning

whether the discharge here applies to plaintiffs' claims. Plaintiffs contend that at least some of their claims accrued after the bankruptcy was confirmed and that they received inadequate notice of the confirmation, factors that could preclude application of the discharge to at least some of their claims.

Fortunately, we need not resolve these thorny issues. Even if UAL's bankruptcy discharge created a jurisdictional bar to plaintiffs' claims, an exception to the general rule that jurisdictional issues must be addressed before consideration of the merits allows us to affirm the decision of the district court. Under what has been called the "foreordained" exception, a court may rule that a party loses on the merits without first establishing jurisdiction if the merits have already been decided in the court's resolution of a claim over which it *did* have jurisdiction. *Starkey ex rel. A.B. v. Boulder County Soc. Servs.*, 569 F.3d 1244, 1259-61 (10th Cir.2009) (citing *Steel Co.*, 523 U.S. at 98-100). In such cases, the court is "not producing an advisory opinion .... it is merely parroting a prior decision." *Id.* at 1260. As it turns out, due to the nature of the claims in plaintiffs' complaint, we may reach certain claims notwithstanding the bankruptcy discharge. Provided that the claims subject to the bankruptcy discharge depend on the same factual and legal predicates as those claims over which the federal courts unquestionably have jurisdiction, we may then dispose of the allegedly discharged claims as well.

In their complaint, plaintiffs asserted claims for both damages and equitable relief. Specifically, they sought the following forms of equitable relief: (1) a declaratory judgment declaring that UAL violated

Title VII; (2) removal of disciplinary actions and notations from their files; and (3) promotion or a new job assignment. Dalvit's claims for promotion or a new job assignment and for removal of disciplinary actions from her UAL file have arguably been mooted by her departure from UAL.[FN6] All of Benjamin's equitable claims remain pending.

Claims for equitable relief are dischargeable under the bankruptcy code if they can be "reduced to a monetary obligation." *Ohio v. Kovacs*, 469 U.S. 274, 282, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985). That is, such claims to be discharged must involve "a right to payment." 11 U.S.C. § 101(5). Included within a discharge are equitable claims that can be viably replaced with an alternative remedy involving a right to payment. *See generally Rederford v. U.S. Airways, Inc.*, 586 F.Supp.2d 47, 51-53 (D.R.I.2008) (analyzing equitable claim for reinstatement under Americans With Disabilities Act and concluding claim involved right to payment and was thus discharged in defendant's bankruptcy). The reverse is also true: equitable remedies, such as a request for prospective injunctive relief, may survive the debtor's discharge if not reducible to a monetary obligation. *Kovacs*, 469 U.S. at 284-85.

Benjamin's claim for "removal of any and all disciplinary actions and notations in [her personnel] files," Aplt.App., Vol. I at 13, 29, has no monetary equivalent. We therefore conclude that at least one of Benjamin's equitably-based claims is justiciable, irrespective of UAL's bankruptcy discharge. We will proceed to adjudicate the summary judgment issues as to that claim. The results of that adjudication may then foreordain the fate of both plaintiffs' remaining

claims, notwithstanding any unresolved issues concerning UAL's bankruptcy discharge, provided that the legal and factual issues we have resolved conclusively dispose of those involving their other claims.

2. Standard of Review

We review the district court's grant of summary judgment de novo, applying the same standard as the district court. *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1058 (10th Cir.2009). Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In making this determination, we "examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *Pinkerton*, 563 F.3d at 1058 (citation omitted). "At this stage, [c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.... The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* (quotation omitted). But "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

3. District Court's Striking of Plaintiffs' Summary Judgment Affidavits

In opposition to UAL's motion for summary judgment, plaintiffs submitted personal declarations

replete with inadmissible hearsay and speculation. The district court granted UAL's motion to strike them, finding that they primarily contained cumulative information and conclusory, unsubstantiated statements. Generally, "a court will disregard only those portions of an affidavit that are inadmissible and consider the rest of it." *Casas Office Mach., Inc. v. Mita Copystar Am., Inc.*, 42 F.3d 668, 682 (1st Cir.1994). Here, however, plaintiffs raised no issue concerning the district court's decision to strike their declarations in their opening brief on appeal. We therefore consider the issue waived, *see Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir.2007), and affirm the striking of plaintiffs' declarations in their entirety.

4. Claims Not Included in EEOC Charge

Before reaching the merits of Benjamin's equitably-based claim for removal of disciplinary notations in her personnel file, we will address the district court's dismissal of plaintiffs' claims based on alleged retaliation after their reinstatement. "Exhaustion of administrative remedies is a jurisdictional prerequisite to suit under Title VII." *Jones v. Runyon*, 91 F.3d 1398, 1399 (10th Cir .1996).[FN7] "A plaintiff's claim in federal court is generally limited by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination submitted to the EEOC." *Jones v. United Parcel Serv., Inc.*, 502 F.3d 1176, 1183 (10th Cir.2007) (quotation omitted). Under this rule, "each discrete incident of [retaliatory] treatment constitutes its own unlawful employment practice for which administrative remedies must be exhausted." *Martinez v. Potter*,

347 F.3d 1208, 1210 (10th Cir.2003) (quotation omitted).

Prior to filing this lawsuit, each plaintiff filed a charge of discrimination and retaliation with the EEOC. These charges described the personal harm resulting from UAL's actions as follows:

On December 28, 2005, I was suspended from my job as a ramp supervisor on special assignment and later removed from the special assignment as a punishment. I was then placed on probation, and later a disciplinary letter was placed in my file, which has the effect of continuing me on probation and affecting my employment for five years. In addition the company has docked our pay for leaving work early, treating us like an hourly non-exempt employee, but failed to pay overtime for working late, treating us like a salaried exempt employee. This difference in pay structure is a violation of the Fair Labor Standards Act [FLSA] and impacts females more than males.

Aplt.App., Vol. V at 501, 504.[FN8]

Plaintiffs complain of numerous adverse actions not described in their EEOC charge that allegedly occurred after they returned from suspension in January 2006. *See* Aplt. Opening Br. at 36-40. Although these actions were included in their first amended complaint, they did not exhaust their administrative remedies concerning these adverse actions prior to bringing the complaint.[FN9] The district court therefore properly concluded that it lacked jurisdiction to consider discrimination and/or retaliation claims based on these incidents.

5. *McDonnell-Douglas* Standard

We may now proceed to the adjudication under our de novo summary judgment standard of Benjamin's equitably-based discrimination and retaliation claims involving the notation placed in her personnel file. We analyze these claims using the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this framework, Benjamin had the burden of initially establishing a prima facie case of discrimination. *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1142 (10th Cir.2009). To do this, she had to show that (1) she was a member of a protected class; (2) she suffered an adverse employment action; and (3) the challenged action took place under circumstances giving rise to an inference of discrimination. *E.E.O.C. v. PVNF, L.L.C.*, 487 F.3d 790, 800 (10th Cir.2007).

Assuming Benjamin made her prima facie case, the burden then shifted to UAL to articulate a legitimate, non-discriminatory reason for its actions. *Turner*, 563 F.3d at 1142. If it did so, then the burden shifted back to Benjamin to show that UAL discriminated against her on the basis of her gender. *Id.* She could carry this burden by showing that UAL's legitimate, non-discriminatory reason was pretextual, i.e., unworthy of belief. *Id.*

The analysis for Benjamin's retaliation claim is similar, except for the elements of the prima facie case. To prove a prima facie case of retaliation, she had to show (1) that she engaged in protected activity, (2) that UAL took a material "adverse

action" against her, and (3) that there was a causal connection between the protected activity and the adverse action. *See Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1176 (10th Cir.2007).

6. Equitable Claim for Removal of Letter of Counsel

Benjamin contends that UAL discriminated and retaliated against her by placing a disciplinary Letter of Counsel in her personnel file. She contends that this action was discriminatory because men were not treated in the same way, and retaliatory because it was orchestrated by Mortimer, who had retaliatory animus against her because of her previous discrimination complaints.

a. Prima Facie Case

UAL contends that Benjamin has failed to make out a prima facie case of either discrimination or retaliation, because Letters of Counsel do not rise to the level of an "adverse employment action." The consequences of UAL's Letters of Counsel in general and those issued to plaintiffs in particular are hotly disputed and there is significant factual dispute in the record concerning their effect.

Benjamin claimed that such letters are "huge" with UAL. Aplt.App., Vol. I at 91 (depo. p. 241). They are used to weed out candidates for promotion or job change. The letters were discipline and would remain in plaintiffs' files for five years, poisoning their chances for advancement. Benjamin testified she was told that she would not be interviewed for jobs at UAL because of the disciplinary letter in her file. *Id.*, Vol. III at 364. Rhonda Patterson-Eachus, another

supervisor at UAL, confirmed that the effect of the letters in plaintiffs' files was that they would have no further advancement at UAL under Mortimer's supervision.

Mortimer provided an entirely different perspective on the letters. He stated that he did not consider them a form of discipline. They would have no effect on an employee's career. Moreover, he opined that the effect of these particular letters was mitigated by the fact that they explicitly stated that there was no evidence that plaintiffs violated UAL's rules.

Jeanne Nelli from HR testified that a Letter of Counsel is not a form of discipline. Rather, it is designed to change behavior before discipline is imposed. In her affidavit, she stated that Letters of Counsel do not limit an individual's ability to be hired for other positions at UAL.

Although the facts are disputed, we will assume for summary judgment purposes that Benjamin has made out a prima facie case of discrimination and retaliation in connection with the placement of the Letter of Counsel in her file. We must next ask whether UAL has advanced a legitimate, non-discriminatory and non-retaliatory reason for the discipline it imposed.

b. UAL's Legitimate Reasons

UAL's reasons are detailed in the Letter of Counsel. The Letter explains UAL's actions as follows:

(1) UAL met with Benjamin on December 28, 2005, "to collect information regarding discrepancies between the hours you recorded on your pay certification instruments and the electronic records of your arrivals and departures at work." Aplt.App., Vol. II at 215. "At the end of that meeting you were held out of service pending an investigation." *Id.*

Massey conducted an investigation within the FIT Team, and concluded that there was insufficient information to support a violation of UAL's rule of conduct prohibiting falsification of company records or reports.

(3) She also concluded, however, that Benjamin had shown questionable ability as a leader in the organization. She reached this conclusion for two reasons:

(a) The electronic records of Benjamin's arrivals and departures showed that she had left work early on numerous occasions without authorization of an Operating Manager. "In fact, several members of management and frontline employees noticed your frequent absence and questioned your assignment and schedule." *Id.* Massey noted that even though Benjamin was on special assignment, she was responsible for notifying her manager when she left work early and for making up the hours.

(b) Benjamin was notified that Massey's investigation was ongoing and that she would be contacting other supervisors. Massey concluded that Benjamin had "ignored my direction and you called

other supervisors to solicit statements from them." *Id.*

(4) Massey removed Benjamin from the FIT Team but retained her in a supervisory role. She placed her on the swing shift. She also stated that she would be placed on a ninety-day action plan and that her "[f]ailure to successfully meet the expectations outlined in that action plan will lead to discipline up to and including discharge." *Id.*

c. Benjamin's Pretext Arguments

UAL thus provided non-discriminatory, non-retaliatory reasons for its actions in the Letter Benjamin seeks to have removed from her files. Benjamin contends that these explanations are pretextual, however, for the following reasons:

(1). Mortimer's Participation

First, and generally, Benjamin contends that Mortimer was openly sexist with female employees in general and personally angry with her for making allegations of discrimination with UAL's personnel department. His discriminatory and retaliatory animus, she claims, caused him to orchestrate the actions taken against her that are reflected in the Letter of Counsel.

The record does not bear out the contention that Mortimer orchestrated the adverse actions taken against Benjamin. The evidence shows, rather, that it was Massey who made most of the decisions of which she now complains. Benjamin attempts to use the fact that Massey often communicated her findings to Mortimer during the investigation, and

sought his approval or authorization as well as that of other supervisors for the actions she proposed, to suggest that she was a sort of puppet whose strings he pulled to mastermind her downfall. But the record does not support this theory.

Benjamin contends that Mortimer "triggered" the investigation into her working hours. But the uncontroverted evidence shows that Mortimer asked Nail to investigate only after Nail reported to him concerns from co-workers about plaintiffs' attendance. Benjamin also complains that Mortimer knew that Nail had no evidence of wrongdoing at the time Nail brought these concerns to him. But, as Mortimer explained, it was precisely the lack of hard evidence, coupled with Nail's expressions of concern, that prompted him to have Nail investigate and look at plaintiffs' badge histories, to determine the facts based on objective evidence.

After Mortimer brought it to Kyte's attention that there were individuals who were not working their full shifts, Kyte recommended to Mortimer that he employ another department manager to conduct the investigation. Kyte recommended Massey to conduct the investigation, because she was unbiased.[FN10] Mortimer followed Kyte's recommendation.

Massey testified that it was her decision to send Benjamin home during the investigation.[FN11] Jeff Gill agreed to this. She also told Mortimer of her decision. She also informed Mortimer she was going to send Benjamin home without pay.[FN12] She conferred first with Gill "to make sure that we'd been consistent in the past with what we'd done with other management employees." *Id.*, Vol. VI at 599. The

record thus makes it clear that it was Massey, not Mortimer, who decided to suspend Benjamin pending the investigation.[FN13]

Massey then conducted the investigation. Nail provided her with information about working hours and reporting requirements for the FIT Team. Mortimer was not involved in the investigation. At the close of her investigation, Massey determined that Benjamin would be brought back to work.

Massey drafted the Letters of Counsel and asked Mortimer to proofread them. He made no changes to the Letters.

It was Massey's suggestion, approved by Kyte, Gill, and Mortimer, to remove Benjamin from the FIT Team. While Kyte, Gill, and Mortimer approved or agreed with this course of action, she did not discuss the decision with Mortimer beforehand and he did not provide input about it.

Benjamin claims Mortimer placed her on a ninety-day action plan. But the evidence she cites shows only that Mortimer informed her new supervisor, Patterson-Eachus, that she would be placed on the plan. *Id.,* Vol. IV at 388 (depo. p. 8). It was Patterson-Eachus's responsibility to draw up the plan. Mortimer did not tell her what to put in it. *Id.* at 387-88 (depo. pp. 8-11). Although she gave it to Mortimer, he did not comment to her about it. *Id.* at 392 (depo. p. 27).[FN14]

Benjamin complains that it was Mortimer who told her that the Letters would stay in her file for five years. But the evidence shows that the five-year

requirement was UAL's policy, not Mortimer's personal decision. *Id.*, Vol. IV at 450 (Jeanne Nelli depo. pp. 58-59).

Benjamin further asserts that it was Mortimer who decided that the Letter constituted a form of "discipline" and that she would have to disclose that she was "on discipline" when applying for other jobs at UAL. If Mortimer made such a statement to her, however, it was in contravention of UAL policy. *See* Aplt.App., Vol. VI at 589-90 (Nelli affidavit). Moreover, any actual denial of employment opportunities based on Mortimer's interpretation lies beyond the scope of Benjamin's EEOC complaint.

In sum, the evidence and reasonable inferences therefrom, taken in the light most favorable to Benjamin, fails to support her theory that Mortimer masterminded and instigated a campaign of discrimination and retaliation against her, culminating in the Letter of Counsel and the discipline imposed in it and in accordance with it. Benjamin's contention that Mortimer's involvement in the disciplinary process demonstrates pretext fails.

(2) UAL's Decision to Suspend Benjamin

Benjamin next contends that her suspension was "groundless." Aplt. Opening Br. at 13. She claims that the parking lot arrival and departure records established that she had worked eighty hours every two weeks, and that this was all UAL required. She supports this contention with an out-of-context misreading of UAL's response to her EEOC charge. *See id.* (quoting Aplt.App., Vol. V at 509).

UAL's EEOC response states that UAL had "frequent reports" concerning Benjamin's absences, Aplt.App., Vol. V at 508, and that investigation by Massey established that she had left work early on numerous occasions but certified that she had worked full days, *see id.* Massey then began an investigation to determine whether Benjamin had in fact falsified company records. In the course of this investigation, Massey found that Benjamin's arrival and departure records indicated that she had left work early, while certifying that she had worked a full eight-hour day. As the investigation continued, Massey learned from FIT Team members that they "understood that work hours were 'flexible' in that on occasions when members of the team might work less than 8 1/2 hours per day, there would be other occasions [when] they would be required to work more than 8 1/2 hours per day, but the expectation was that team members worked at least 80 hours in a two week pay period." *Id.* at 509. Thus, the "80 hour" requirement came from Massey's interview of Team members and their understanding of the FIT Team requirements. Nothing in UAL's EEOC response, however, indicates that it was UAL's policy that Benjamin was free to work whatever schedule she liked, without notifying anyone, so long as she worked eighty hours in a pay period.

(3). Length and Conditions of Suspension

As the Letter of Counsel notes, UAL suspended Benjamin on December 28, 2005 and she was not reinstated to duty until January 23, 2006. Benjamin argues that UAL kept her on suspension for the full four weeks because she complained about discrimination during the suspension. She further contends that UAL's justification, that it was

conducting an investigation of her work hours during this time period, is pretextual because UAL knew from witnesses within a week that hours on the FIT Team were flexible and that she had therefore done nothing wrong. Benjamin contends that once Massey obtained this knowledge from the witnesses, she should have been immediately reinstated.

Benjamin's contention that the length of the suspension was retaliatory cannot survive summary judgment. First, she did not contend in the district court, or in her opening brief in this appeal, that Massey knew of her discrimination complaint to HR in Chicago during her suspension.[FN15] The district court specifically found that it was undisputed that Massey did not know of the discrimination complaint until this suit was filed. Aplt.App., Vol. XII at 1386 n. 13. Benjamin does not challenge this finding in her opening brief in this court. It was Massey who chose when to bring her back from suspension, and Benjamin has failed to demonstrate that she had any reason to retaliate against her.[FN16]

Benjamin has also failed to show that UAL's explanation for the length of the suspension was pretextual. Regarding the three to four weeks it took to bring Benjamin back from suspension, Massey stated:

I don't believe that that's a long period of time when you're trying to-you're in a middle of a holiday season, you have different work schedules, and just reviewing all the facts and trying to do a complete investigation and reviewing everything with HR, I'm not sure that I agree that that's a long period of time.

Aplt.App., Vol. XII at 1235.

Massey conducted her investigation by speaking to UAL employees during the first week that Benjamin was on suspension. Between the time she finished these interviews, sometime during the first week of January 2006, and the time Benjamin was called in and presented with the Letter of Counsel, on January 18, 2006, only two weeks elapsed. During this time, Massey had to decide on the discipline to be imposed, consult with her superior Kyte and others involved, and draw up the Letter.

UAL's response to Benjamin's EEOC complaint further explains that "[u]ltimately, it was determined that there may have been some confusion regarding the FIT team members' schedules." *Id.*, Vol. V at 509. Benjamin fails to show that in a case involving such confusion and the employer's perceived need for a complete investigation, that the delay in returning her from suspension was so excessive that UAL's explanation should be considered a pretext for retaliation.

Benjamin also complains that she was singled out by being suspended without pay. But Massey testified that she specifically checked with UAL's human resources department to make sure that suspension without pay was consistent with UAL's usual practice. Benjamin fails to show that this explanation is unworthy of belief.

(4). Massey's Decision Concerning Wrongdoing

Benjamin contends that since Massey ultimately found that she had committed no wrongdoing, the

justifications UAL advanced for the discipline imposed on her in the Letter of Counsel are unworthy of belief. In her deposition, Massey testified that she had found no "indications or evidence of any wrongdoing" by Benjamin. *Id.*, Vol. IV at 419 (depo. p. 21).[FN17] Reading further in her deposition, however, she explains that although Benjamin had not violated a rule or policy of UAL, UAL took action to remove her from the FIT Team because her actions called into doubt her "credibility" as a member of the Team. *Id.* at 421 (depo. p. 40).

Massey acted consistently with this understanding. She reinstated Benjamin to her employment as a supervisor and arranged for her to be paid for the time she had been suspended. The Letter of Counsel, *signed by Massey herself,* then explained that some additional actions would be taken against Benjamin because of her questionable conduct. Whether or not these actions seem warranted to a detached judicial observer is not the issue. "The relevant inquiry is not whether the employer's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs." *Rivera v. City & County of Denver*, 365 F.3d 912, 924-25 (10th Cir.2004) (quotation omitted). Benjamin fails to show that Massey's understanding of "no wrongdoing" required her to avoid imposing the measures outlined in the Letter of Counsel. Her conclusion that Benjamin had not violated UAL's official rules or policies does not demonstrate that the reasons given for the further actions taken in the Letters of Counsel were pretextual.

(5). Male Comparators

Benjamin contends that UAL's reasons are pretextual because similarly-situated male supervisors and FIT Team members did the same things for which she was sanctioned in the Letter of Counsel, without being punished as she was. The record does not bear out this claim, however.

Massey stated that she spoke with two male Team members, George Bellopatrick and Jeff Freitas. Each of them told her that he would sometimes work more or less hours in a day, but that his operating manager was informed of the hours he was working. The Letter of Counsel specifically censured Benjamin for not keeping her managers similarly advised of her schedule.[FN18] Benjamin claims she was not required to notify her supervisor of her working hours. But it is UAL's understanding of this requirement, not hers, that counts. She has not shown that UAL excused FIT Team members from communicating with their Operations Manager concerning their work schedules.

Benjamin has also failed to show that there were complaints from fellow employees about other male managers as there were about her, or that these other managers missed a meeting at which they were scheduled to give a presentation, as Benjamin did. Benjamin makes broad-ranging claims about a variety of male supervisors who were allowed to go home early without changing their certifications, *see id.*, Vol. III at 347, but she fails to show that these men were similarly-situated to her: that is, that they had the same supervisor or were subject to the same standards involving performance evaluation and discipline. *See Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir.1997).

(6). Benjamin's Failure to Respect the Investigative Process

One of the reasons given in the Letter of Counsel for disciplining Benjamin was that she contacted other supervisors during Massey's investigation and therefore failed to respect the investigative process. Benjamin contends this explanation is unworthy of belief. She cites her own deposition testimony to establish that (1) she did not sign a confidentiality agreement; (2) no one told her not to contact others; and (3) she thought she had been terminated rather than suspended and that it was permissible to contact her fellow employees because there was in effect no ongoing investigation. This evidence has value in showing pretext only to the extent that it tends to show that *Massey's* statement that Benjamin failed to respect the investigative process is unworthy of belief. Benjamin's own, subjective beliefs about confidentiality are irrelevant.

While Benjamin was not asked to sign a confidentiality agreement, the Letter of Counsel did not admonish her for failure to adhere to the terms of such an agreement. Instead, it noted that Massey had "informed you that the investigation was ongoing and I would be contacting other Supervisors. Yet, you ignored my direction and you called other supervisors to solicit statements from them." Aplt.App., Vol. II at 215. In other words, Massey concluded that her instruction to Benjamin about the investigation should have forestalled her from interfering by conducting her own "investigation" and contacting the same supervisors with whom Massey intended to speak.

While Benjamin contends that she did not know whether there was an ongoing investigation, she does not specifically deny Massey's statement that she told Benjamin she would be contacting other supervisors. And there is evidence that Benjamin should have known that the investigation was ongoing. Plaintiff Dalvit admitted that Massey never told her that the investigation had been concluded. *Id.*, Vol. II at 123 (depo. p. 155). She did not recall Massey saying that she had come to any conclusions. *Id.* (depo. p. 156). Plaintiff Benjamin stated that she was told before she was sent home that "We'll get back to you." *Id.*, Vol. I at 96 (depo. p. 309). Plaintiff Dalvit was told she was being sent home "until further notice." *Id.*, Vol. II at 121 (depo. p. 143). While it would perhaps have been preferable for Massey to have been more clear with Benjamin concerning the ongoing nature of the investigation, and even to have requested her to sign a confidentiality agreement, her failure to do so does not demonstrate pretext.

d. Conclusion

Benjamin has failed to show that UAL's legitimate, stated reasons for the discipline imposed upon her were a pretext for either discrimination or retaliation. This being the case, she is not entitled to the equitable relief sought of removal of the Letters of Counsel from her file.

7. Effect on Remaining Claims

a. Benjamin's Remaining Claims

In addition to the other forms of equitable relief Benjamin sought that are reducible to monetary

terms and thus dischargeable in bankruptcy, she sought damages including all compensation, salary raises, normal performance reviews, back pay, equal pay, front pay and benefits that plaintiffs were denied because of defendant's acts and failures to act, in a sum to be determined by the court and jury; liquidated and compensatory damages, including for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life, in a sum to be determined by the court and jury; exemplary or punitive damages in a sum to be determined by the court and jury; legal fees, disbursements, expert fees, and costs of this action [and] all legal interest on sums awarded.

Aplt.App., Vol. VIII at 855-56.

Her remaining claims for legal and equitable relief damages fail, for the same reasons outlined above in relation to her claim for removal of the Letter of Counsel from her file. Simply put, UAL's legitimate reasons are the same and our holding with regard to her failure to show pretext for purposes of surviving UAL's summary judgment motion on the Letter of Counsel claim applies with the same force to each and every one of her other properly-exhausted claims, whether legal or equitable, and whether or not dischargeable in bankruptcy. The analysis and factual basis are essentially undistinguishable. For this reason, our disposition of the Letter of Counsel claim, over which we unquestionably have jurisdiction, foreordains the defeat of all of her other claims over which jurisdiction is uncertain. *See Starkey*, 569 F.3d at 1259-61. Thus, in affirming the district court's summary judgment disposition of these claims, we merely parrot our decision as to her

Letter of Counsel claim rather than producing an advisory opinion. *Id.* at 1260.

b. Dalvit's Claims

A careful review of plaintiffs' appellate briefs and the entire record on appeal, especially including plaintiffs' EEOC charges, their complaints, and the final pretrial order, demonstrates that Dalvit's legal and equitable claims are in essential terms identical in law and fact to Benjamin's. Dalvit's claims for removal of the disciplinary letter from her file and for promotion and a new job assignment at UAL have been mooted by her departure from UAL, and her claim for conduct after suspension, up to and including constructive discharge, was not properly exhausted before the EEOC. But as to the remainder of her claims, which are before the court, the reasoning we have advanced above concerning Benjamin's claims applies to Dalvit's claims as well. For this reason, we may and do, without producing an advisory disposition but also without deciding whether UAL's bankruptcy discharge has barred Dalvit's claims for relief, affirm the district court's summary judgment on each of Dalvit's claims. *Cf. Carolina Cas. Ins. Co. v. Pinnacol Assurance*, 425 F.3d 921, 928 (10th Cir.2005) (stating that where court has jurisdiction to "affirm the judgment against [one plaintiff] on a ground that would also require affirmance of the judgment against [a second plaintiff] ... we can affirm the judgment against [the second plaintiff] without first determining [as *Steel Co.* requires] that he has Article III standing.").

The judgment of the district court is AFFIRMED.

FN* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

FN1. Some evidence in the record suggests that ramp supervisors were actually required to "cert" an eight-and-one-half hour day, with the half-hour being allocated to a lunch break. Any such factual discrepancy is not material to the issues in this appeal, and we refer throughout this order and judgment to an eight-hour day.

FN2. The "FIT Team" is sometimes referred to in the record as the "ROP Team." "ROP" stands for "resource optimization." For the sake of consistency, we refer throughout this order and judgment to the "FIT Team."

FN3. Plaintiffs' claims appear to have accrued in large part subsequent to the filing of UAL's bankruptcy petition but prior to confirmation of its Chapter 11 Plan, and thus would properly be treated as an administrative expense of the bankruptcy estate. *See In re U.S. Airways, Inc.*, 365 B.R. 624, 628 n. 8 (Bankr.E.D.Va.2007).

FN4. Plaintiffs assert that UAL cannot assert the bankruptcy discharge on appeal because it failed to cross-appeal from the district court's rejection of the defense. But the bankruptcy discharge, if jurisdictional, may be raised at any time, and if not jurisdictional, is simply an alternate ground for affirmance that did not require a cross-appeal. *See, e.g., Tinkler v. United States ex rel. FAA*, 982 F.2d 1456, 1461 n. 4 (10th Cir.1992).

FN5. *Compare Lone Star Sec. & Video, Inc. v. Gurrola (In re Gurrola)*, 328 B.R. 158, 164 (9th Cir.BAP2005) (stating that provision in 11 U.S.C. § 524(a) making judgments imposing personal liability on debtor with respect to a discharged debt "void" involves "a term of art ... that equates with the concept of a nullity associated with lack of jurisdiction") *with Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 967-68 (7th Cir.1996) (striking belated attempt to raise bankruptcy discharge defense, concluding that under Fed.R.Civ.P. 8(c), discharge in bankruptcy is affirmative defense that must be timely asserted or waived). It should be noted that the Supreme Court has recently adopted an amendment to Fed.R.Civ.P. 8, effective December 1, 2009, that eliminates discharge in bankruptcy as an affirmative defense that is waived if not raised. This amendment is consistent with § 524(a)(1), which voids any judgment on a discharged debt and enjoins any attempt to collect the debt, *whether or not the debtor invokes the discharge.*

FN6. Dalvit presented no evidence that the ongoing existence of disciplinary actions and notations in her UAL file will have any adverse effect on her now that

she has left UAL.

FN7. Because exhaustion is jurisdictional, we may determine the issue of whether plaintiffs exhausted these claims without first determining whether these claims would be barred by UAL's bankruptcy discharge. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578, 585, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (stating there is "no unyielding jurisdictional hierarchy" and federal courts may "choose among threshold grounds for denying audience to a case on the merits.").

FN8. Plaintiffs do not pursue their FLSA claims in this appeal.

FN9. As the district court pointed out, plaintiff Dalvit filed a second charge of discrimination on or about September 21, 2007, subsequent to the filing of her complaint in this action. This charge asserted claims relating to constructive discharge, but also included claims concerning harassment and denial of promotion leading up to the alleged constructive discharge. Aplt.App., Vol. V at 534. She received a "right to sue" letter from the EEOC on February 1, 2008, after UAL had filed its motion for summary judgment. She initially moved to amend her complaint to include a claim for constructive discharge, then dropped that effort and filed a separate action based on constructive discharge. Plaintiffs argue, nevertheless, that this belated exhaustion cured Dalvit's failure to obtain a right-to-sue letter on her post-suspension claims before filing this suit.

Some circuits hold that a party may "file an action prior to receiving [a] right to sue letter, provided there is not evidence showing that the premature filing precluded the [EEOC] from performing its administrative duties or that the defendant was prejudiced by such filing." *Edwards v. Occidental Chem. Corp.*, 892 F.2d 1442, 1445 n. 1 (9th Cir.1990) (emphasis added). In this circuit, however, exhaustion before the EEOC is considered jurisdictional. *See Jones*, 91 F.3d at 1399 & n. 1. Where exhaustion is jurisdictionally required prior to bringing a claim, a party generally may not cure the jurisdictional defect by belatedly pursuing her administrative remedies. *Cf. McNeil v. United States*, 508 U.S. 106, 111-12, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993) (determining that prematurity of unexhausted FTCA claim was not cured by subsequent exhaustion of administrative claims). Moreover, even if we were to permit post-hoc exhaustion, the district court here made a specific finding that permitting such a belated cure would prejudice UAL. Aplt.App., Vol. XII at 1390. Plaintiffs fail to demonstrate that this finding represents an abuse of discretion.

FN10. The evidence is in conflict concerning whether Kyte "recommended" or "selected" Massey. Kyte stated that he recommended Massey to conduct the investigation. Mortimer also stated that Kyte recommended Massey to him, but when asked who "selected" Massey, he said "Jim Kyte." Aplt.App., Vol. II at 167. On summary judgment review, we adopt the set of facts most favorable to Benjamin and assume that Kyte "recommended" rather than "selected" Massey.

FN11. Although Benjamin asserts that "Mortimer controlled every personnel action during his tenure in Denver" and that she "could not have been suspended without his approval," Aplt. Opening Br. at 44, the record evidence she cites for these conclusory contentions comes from Benjamin's stricken declaration.

FN12. Benjamin contends that Massey "conferred with Mortimer when [the] plaintiffs were suspended." Aplt. Opening Br. at 44. She refers to Massey's deposition, which actually states "I *let Kevin Mortimer know* and I let Jim Kyte know" that she had decided to send Benjamin home. Aplt.App., Vol. VI at 600 (emphasis added). When asked in a follow-up question what Mortimer said when she informed him of this decision, Massey responded "[n]othing." *Id*

FN13. As proof of Mortimer's role in suspending Benjamin, she cites Rhonda Patterson-Eachus's statement that "Kevin Mortimer was a manager who very much ran the operation." Aplt. Opening Br. at 44 (quoting Aplt.App., Vol. IV at 388, (depo. p. 13)). But this statement was made in the context of his *knowledge* of the investigation of Benjamin's discrimination complaint, not his role in her suspension.

FN14. The evidence is in conflict concerning whether an action plan even existed. Mortimer told Dalvit that she would not be placed on a ninety-day action plan as stated in her Letter of Counsel, because he did not know how to write up such a plan, given that

the Letter had found insufficient evidence to support a violation. Instead, he purportedly stated, the Letter would stand as the action plan.

FN15. In her opening brief, Benjamin asserts, in passing, that she complained *to Massey* that she was being subjugated because she was female, and that she knew of this complaint when she took subsequent adverse actions against her. Aplt. Opening Br. at 64 n. 3. Therefore, Benjamin asserts, there is a sufficient connection between her complaint and Massey's actions to prove a prima facie case of retaliation separate and apart from retaliation based on the complaint to HR and without any involvement by Mortimer. Benjamin did not make this argument to the district court, and we do not consider it here.

FN16. If Massey was unaware of the discrimination complaint, Benjamin arguably does not even establish a prima facie case of retaliation, because she failed to show a causal connection between the protected activity and the adverse employment action. *See Jones*, 502 F.3d at 1195.

FN17. Benjamin further contends that she concluded that no discipline was appropriate, citing Aplt.App., Vol. IV at 421. But this statement was in explanation of why no "discipline" was *imposed*. *See id.* Obviously, "discipline" meant something different to Massey than the sanctions set out in the Letter of Counsel, because she *did* find those appropriate and they *were* imposed on Benjamin.

FN18. Nail also stated that he investigated and prepared spreadsheets concerning Bellopatrick and Freitas, but that these showed no discrepancies in hours as Benjamin's did. Aplt.App., Vol. II at 145-46. It is difficult to square this claim with Bellopatrick and Freitas's admission to Massey that they worked flexible hours while on the FIT Team, sometimes putting in less than a full day. *See id.*, Vol. IV at 418. In any event, we do not rely on Nail's conclusions as a basis for distinguishing Bellopatrick and Freitas from Benjamin.

APPPENDIX C

NOT SELECTED FOR PUBLICATION

[Filed August 11.2008]

UNITED STATES DISTRICT COURT
FOR THE DISRICT OF COLORADO
JUDGE WALKER D. MILLER

DAVA DALVIT and DEBRA BENJAMIN, *Plaintiffs*	)	
v.	)	Nos. 1:07-CV-725 1:07-CV-726
UNITED AIRLINES, INC. *Defendant.*	)	

ORDER ON MOTION FOR SUMMARY JUDGMENT

Miller, J.

This matter is before me on the Defendant's Motion for Summary Judgment (doc no 28), Defendant's Motion to

Strike Declarations (doc no 45), Plaintiffs' Motion to Substitute Amended Declarations In Opposition to Motion for Summary Judgment (doc no 53), and the parties' supplements to their summary judgment briefs (docs no 63 and 70). The motions are all opposed. Upon review of the parties' filings, I conclude oral argument is not required. I have jurisdiction to consider the matter on the merits.[FN1] For the reasons that follow, Defendant's Motion for Summary Judgment will be granted. Defendant's Motion to Strike Declarations will be granted and Plaintiffs' Motion to Substitute Amended Declarations In Opposition to Motion for Summary Judgment will be denied as futile.

FN1. Defendant argues in a separately-filed Motion to Dismiss (doc no 83) that Plaintiffs' claims were discharged in Defendant's bankruptcy reorganization and that this affirmative defense deprives the Court of subject-matter jurisdiction. I am not persuaded by Defendant's argument in this regard and conclude that I have jurisdiction to rule on the summary judgment motion.

Background[FN2]

FN2. The facts set forth herein are taken from the parties' briefs and attached exhibits and are undisputed, unless otherwise noted. Plaintiffs did not entirely comply with my Trial and Pretrial Procedures, which require that the numbered paragraphs in the "Response to Statement of Undisputed Material Facts" and "Statement of Additional Disputed or Undisputed Material Facts" contain "brief factual explanation" and singular facts, not the extended argumentative paragraphs found throughout Plaintiffs' brief.

This is an employment discrimination lawsuit pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII") and the Family and Medical Leave Act ("FMLA"). Plaintiff Benjamin began working for Defendant United Air Lines, Inc. ("United") in Denver in 1998. In 2000, she was promoted to the position of ramp supervisor. Plaintiff Dalvit was hired as a ramp supervisor in June 2005. This is a management position; ramp supervisors are responsible for a number of jobs related to ensuring on-time departures of aircraft. Ramp supervisors report to operating managers ("OMs"), who in turn report to department managers. At the top of this hierarchy is the station manager. During the relevant time period, the station manager at Denver International Airport ("DIA") was James Kyte.

At various times after she began working at United, Benjamin requested and received time off under FMLA for migraine headaches. In 2005, her OM was Steve Peters ("Peters"). According to Benjamin, Peters made remarks about her dependability, stating, "You need to be here when you're scheduled to work." Benjamin informed Peters that her time off was pursuant to FMLA and that he should not comment on it. She also complained to the department manager, Kevin Mortimer ("Mortimer"). Mortimer spoke with Peters and reminded him that Benjamin's intermittent FMLA leave was protected and that she was entitled to use it. Benjamin continued to take FMLA leave after this incident.

In late 2005, United began assembling a temporary "FIT" ("fix, improve, transform") team, tasked with finding ways of improving performance on the ramp. Mortimer invited Plaintiffs to be on the FIT team at DIA, which was considered a special assignment. At the time, there were six people on the team, three men and three women. Assignment to the FIT team was not a promotion and did not involve a pay raise or other tangible benefit,

but several witness testified that it was believed it could assist a team member's professional advancement at United.

The FIT team met in late November 2008. The team was to be supervised by an OM named Steven Nail ("Nail"). According to Plaintiffs and other team members, at the first meeting of the FIT team, Nail informed the team that they could work a flexible schedule and that since they would be working some longer days, they could also work short days. Contemporaneous notes taken by Benjamin show the following:

"Very flexible schedule-no set time"

"Just get tasks accomplished, if need to change days off for whatever reason-no prob"

"Some days longer some days shorter."

Exh. L to Motion for Summary Judgment (doc no 28-15) at UAL DB 1167.

Plaintiffs testified that they asked Nail how they should keep track of their time as the time recording system did not permit employees to input partial shifts; rather, they had to request that another employee make such changes. According to Plaintiffs, Nail told them he would get back to them on this.

In December 2005, less than a month after the initial FIT team meeting, Nail received a complaint from Peters and at least one other employee that Plaintiffs had been leaving work without having worked full, eight-hour shifts. Nail also learned that Plaintiffs had failed to attend a briefing he asked them to attend to explain the FIT team to other employees. Nail informed Mortimer of these complaints. Mortimer directed Nail to research Plaintiffs'

badge histories (showing the times when Plaintiffs swiped their access cards for DIA's secure areas and employee parking lot) for the previous few weeks. Nail obtained the records for Plaintiffs, and then later for all FIT team employees, and prepared spreadsheets showing the approximate times that each FIT team employee was on site. According to testimony by Nail and Mortimer, the spreadsheets showed that Plaintiffs and Denise VanDyke had not worked eight hours in every shift, but rather that some shifts had been longer and some shorter. According to Nail, the other three employees, all of whom were male, had worked eight hours for each shift. The only records in evidence, however, are of Plaintiffs.[FN3] Nail also testified that all the employees generally informed him of the shifts they were working. Plaintiffs do not dispute that they had left work early on some occasions but contend that they had made up the time on other shifts and that they had acted pursuant to Nail's express authorization in this regard. In addition, they understood from Nail that they were not required to inform him when they were leaving early, although this is required for ramp supervisors not on special assignment.

FN3. Plaintiffs contend that all relevant records were intentionally destroyed to cover up evidence of discrimination, which is strongly disputed by United. If Plaintiffs indeed believe this to be the case, the proper course is to move for sanctions and properly brief the issue. I must make a determination on summary judgment based on the record provided and will not speculate about possible improprieties in connection with the absence of material documents.

After being informed of Nail's data, Kyte recommended to Mortimer that another department manager conduct an investigation into whether Plaintiffs had violated United's Code of Conduct, which prohibits falsification of

company records. Jean Massey, another department manager and a peer of Mortimer's, was assigned to investigate Plaintiffs. Massey is female and did not report to Mortimer or even work in the same department.

Nail gave Massey the spreadsheets he prepared. According to Massey, Nail informed her that he had told employees their schedules were flexible but that they were still expected to work eight and a half hours a day.[FN4] Massey and Nail met with the Plaintiffs individually on December 28, 2005. During each meeting, Massy informed the Plaintiff that she was conducting an investigation and had determined that the Plaintiff had not worked full shifts since being assigned to the FIT team. She took Plaintiffs' security badges and told them they were being held out of service until the investigation was complete. Plaintiffs were not paid while they were held out of service. This is a standard procedure during an investigation into serious misconduct; if it is determined that no violation occurred, the employee is paid for that time. Massey testified in her deposition that it was her decision to suspend the Plaintiffs in this manner. Each Plaintiff protested at the meeting that she had worked short shifts but that she had done so with Nail's consent and had made up the time. Indeed, Plaintiff Benjamin obtained and showed Massey the notes from the initial meeting. Nail did not confirm Plaintiffs' contention at the meetings with Massey and Plaintiffs were unsuccessful in challenging their suspension at that time.

FN4. There is some dispute about whether employees were expected to be on site for eight or for eight and a half hours for each shift, but this does not appear to have been an issue in these events.

There is a factual dispute as to whether Massey informed Plaintiffs that the investigation was confidential. Plaintiffs deny that they were told to keep the investigation confidential and, moreover, provide evidence that United's practice is to use a signed confidentiality form for the purpose of ensuring that information about investigations is not disclosed. There is no dispute that Plaintiffs were not asked to sign a confidentiality form. United appears to contend that Plaintiffs should have understood that all investigations are confidential.[FN5]

FN5. During the investigation, David Jones, a manager and friend of the Plaintiffs, asked Massey about what was happening and she had a brief discussion with him, but the record is not clear about the substance of that discussion.

That night or shortly thereafter, the Plaintiffs contacted or attempted to contact the other FIT team members to see if they had the same recollections of what Nail had told them about hours and scheduling. Plaintiffs also sought written statements from their co-workers, several of whom agreed to provide statements corroborating Plaintiffs' explanation. Plaintiffs faxed their own written summaries to Massey explaining the what they were told, their understanding of the policy, and their strong denial that they had committed any misconduct. Massey interviewed the other members of the FIT team, who confirmed that they understood Nail to say they could work flexible hours, including more or less than eight hours a day, as long as their total hours requirements were met and the work was done.

Approximately one and a half weeks after they were placed on suspension, Plaintiffs contacted United's human resources department in Chicago to complain that their

suspension was discriminatory. Plaintiffs contended that male employees on the FIT team had also left early on occasion but only Plaintiffs were investigated and suspended. Mortimer testified in his deposition that he did not learn of this complaint until after Plaintiffs returned to work; there is some evidence, however, that he learned of it while Plaintiffs were still on suspension.[FN6]

FN6. Jeanne Nelli of United investigated Plaintiffs' complaint, which was apparently dropped because Plaintiffs did not return Ms. Nelli's call.

Massey ultimately determined that Plaintiffs did not falsify their time records and that they should be returned to work. Massey, in consultation with Mortimer and Kyte, also decided that Plaintiffs should not be returned to the FIT team because of Plaintiffs' discussion of the investigation with other team members. Other reasons given by Massey for this decision was "credibility, based on the fact that they ... left during different hours and didn't let their [OM] know what was going on" and that other employees had questioned the Plaintiffs' schedule. Mortimer testified that the reason for Plaintiffs' removal from the FIT team was the "expectation for a member of management is to be at work during prescribed times unless otherwise excused from that." Massey, however, testified in her deposition that Plaintiffs did not violate any provision of United's Code of Conduct; Mortimer testified similarly.

Plaintiffs were scheduled to meet individually with Massey and Mortimer around January 18, 2006. In the meeting, each were given a "letter of counsel," signed by Massey, and stating the following:

I have conducted an investigation within your FIT Team. I have concluded that there is insufficient information to support a violation of Rule # 9 of the United Airlines Rules of Conduct: Falsification of Company records or reports.

However, your behavior while on special assignment and during this investigation causes me to question your ability as a leader in the organization. It is clear from the electronic records of your arrivals and departures that you left work early on numerous occasions without authorization of an Operating Manager. In fact, several members of management and frontline employees noticed your frequent absence and questioned your assignment and schedule. Although you were on a special assignment, you were still responsible for notifying your Manager when you left work early and making up the hours.

In addition, failure to respect the investigative process and share information leaves doubt in your ability to successfully manage employees and lead the department on a special assignment. I specifically informed you that the investigation was ongoing and I would be contacting other Supervisors. Yet, you ignored my direction and you called other supervisors to solicit statements from them.

Exh. M to Motion for Summary Judgment (doc no 28-16). The letter informed Plaintiffs that they would be removed from the special assignment and would be placed on a 90-day action plan, and failure to meet the expectations of the action plan "will lead to discipline up to and including discharge." *Id*

There is significant disagreement about the effect of this letter. It is undisputed that this letter would have to be disclosed if Plaintiffs applied for any other position at United. Plaintiffs provide evidence that a letter like this would essentially be a disqualifier and could hinder their

advancement. Mortimer testified in his deposition that the letter was not discipline, but Plaintiffs contend he told them at the time that it was. Plaintiffs also testified he told them that instead of being put on an action plan, the letter was to serve as the action plan and would be kept in their files for five years. Plaintiffs provide evidence that the usual practice was to keep such letters in an employee's file for two years, but this is disputed by United.

Plaintiffs were assigned to work with Rhonda Patterson-Eachus and returned to work on January 23, 2006. Patterson-Eachus developed an action plan for Plaintiffs. According to Patterson-Eachus, Plaintiffs achieved everything on the action plan. It is unclear whether this is the plan referred to in the letter. Plaintiffs received back pay for the time they were suspended.

Patterson-Eachus testified in her deposition that Mortimer instructed her to lower Plaintiffs' evaluations, which she did not agree with but did at his direction. Salaries at United are determined in part by performance evaluations. Patterson-Eachus also provided evidence that Mortimer had stated that Plaintiffs would never be allowed to be shift supervisors, a position that would assist their promotion within United, and that he refused to approve moving Plaintiff Dalvit to a day shift, despite Patterson-Eachus's numerous requests for this transfer. Mortimer also told the OMs that Plaintiffs would not be receiving any favors. According to Patterson-Eachus, Mortimer indicated his animosity was because of Plaintiffs' discrimination complaint. Plaintiffs testified that after their suspension Mortimer refused to acknowledge their presence.

Plaintiff Benjamin was thereafter assigned to the position of "day swing cargo relief supervisor," which was an outdoor job, while she was pregnant. Her

replacement was a man. Plaintiff Dalvit eventually worked as a fill-in or temporary shift supervisor. She contends that she was denied more desirable shifts that she requested. Dalvit also was sent to be a fueling supervisor, despite her lack of experience in this area.

Plaintiff Benjamin testified in her deposition that she previously heard Nail refer to women employees in derogatory terms, including "f-ing bitch" and "whore." Plaintiff Dalvit testified that Mortimer was often sarcastic and condescending to female employees but not to males; she also offers evidence that she heard him say that women should be at home, barefoot and pregnant, in the kitchen. Another male manager, Larry Everett, testified that he had observed that Mortimer yelled at female employees more than men and generally treated women more harshly. Everett testified that he once expressed dismay at such treatment to Mortimer, saying in response to one such episode, "That's just wrong" and that Mortimer responded, "They'll get over it." Denise Van Dyke, the third woman on the FIT team during the relevant time period, also testified about her observations of Mortimer belittling women. Van Dyke was also removed from the FIT team. Van Dyke related that Nail told her she had been moved to an unfavorable shift because of her association with Plaintiffs. Patterson-Eachus also testified that Mortimer treated men and women differently. She gave as an example a meeting she attended in which men were getting up and down and coming and going, but that when Patterson-Eachus got up to leave for a shift, Mortimer told her to sit down. Mortimer demoted Patterson-Eachus in August 2006, allegedly for reasons unrelated to performance.

Plaintiffs were apparently replaced by two men on the FIT team. Van Dyke was replaced by a woman who had a close association with Nail, the nature of which is disputed.

After exhausting their administrative remedies, each Plaintiff filed a lawsuit, thereafter consolidated into this action. Plaintiff Dalvit asserts the following claims: (1) discrimination and retaliation in violation of Title VII; (2) discrimination and retaliation in violation of C.R.S. §§ 24-34-401 *et seq.* Plaintiff Benjamin asserts the following claims: (1) discrimination and retaliation in violation of Title VII; (2) retaliation in violation of the Family Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.* ; (3) discrimination and retaliation in violation of C.R.S. §§ 24-34-401 *et seq.* Dalvit left United after the initiation of this lawsuit and thereafter filed a second charge of discrimination with the EEOC alleging that she had been constructively discharged.

Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. A factual issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Where "the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden at the summary judgment stage by identifying 'a lack of evidence for the nonmovant on an essential element of the nonmovant's claim.' " *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1115 (10th Cir.2001) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir.1998)). Then, "[t]o avoid summary judgment, the nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case." *Id.*

A plaintiff alleging employment discrimination may prove intentional discrimination by direct or indirect evidence. In the absence of direct evidence, the analysis set forth in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802-804 (1973), provides the framework for assessing indirect, or circumstantial, evidence. *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1226 (10th Cir.2000). Under this analysis, the plaintiff bears the initial burden of presenting a *prima facie* case of discrimination. Kendrick, 220 F.3d at 1226. If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for its action. *Id.* at 1226 (quoting *McDonnell Douglas*, 411 U.S. at 802). If the defendant presents such a reason, the plaintiff bears the "ultimate burden" of establishing that these proffered reasons are a pretext for unlawful discrimination. *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1167 (10th Cir.2000).

The plaintiff may show pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy or credence and hence that the employer did not act for the asserted non-discriminatory reasons." *Jaramillo v. Colorado Judicial Dept.*, 427 F.3d 1303, 1308 (10th Cir.2005); *see also Kendrick*, 220 F.3d at 1230 (three ways of showing pretext are: (1) evidence that the defendant's stated reason for the adverse action was false; (2) evidence that the defendant acted contrary to a written company policy prescribing the action to be taken under the circumstances; or (3) evidence that defendant acted contrary to an unwritten policy or practice when making the adverse decision).

To make out a *prima facie* case of discrimination under Title VII, the plaintiff must show (1) membership in a protected class, (2) an adverse employment action, and (3) disparate treatment among similarly situated employees. *Orr v. City of Albuquerque*, 417 F .3d 1144, 1149 (10th Cir.2005). At the *prima facie* stage, the plaintiff's burden is "not onerous" and the plaintiff need only raise the inference of discrimination. *Id.* (citations omitted).

The burden shifting approach also applies to a claim of retaliation. To establish a *prima facie* claim under Title VII for retaliation, a plaintiff must establish three elements: (1) the plaintiff engaged in protected opposition to discrimination; (2) a reasonable employee would have found the challenged action materially adverse; and (3) a causal connection exists between the protected activity and the materially adverse action. *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1202 (10th Cir.2006) (citing *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)).

A *prima facie* case of retaliation for exercising rights under FMLA involves the following: (1) the plaintiff availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; and (3) there is a causal connection between the two actions. *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1325 (10th Cir.1997).

Discussion

A. *Motion to Strike and Motion to Amend*

I will first address Defendant's Motion to Strike Declarations (doc no 45), and Plaintiffs' Motion to Substitute Amended Declarations In Opposition to

Motion for Summary Judgment (doc no 53). Plaintiffs included as evidence in their response to the Motion for Summary Judgment declarations, or affidavits, signed by them under penalty of perjury. *See* Exh. 5, 6 to Resp. to Motion for Summary Judgment, "Declaration of Dava Dalvit Pursuant to 28 U.S.C. § 1746" (doc no 33-6), "Declaration of Debra Benjamin Pursuant to 28 U.S.C. § 1746" (doc no 33-7). Defendant seeks to strike these declarations on the following grounds: (1) they are made upon information and belief, rather than personal knowledge; (2) they do not set forth facts that would be admissible in evidence, but rather contain hearsay, irrelevant statements, conclusory allegations, legal argument, statements that could not plausibly be premised upon personal knowledge, and statements that are too vague, incoherent, or incomplete to be useful; and (3) Plaintiff Dalvit's declaration contradicts her sworn deposition testimony. Plaintiffs oppose the motion, and seek, by separate motion, to amend the declarations to remove the introductory statement in each declaration indicating that the declaration is "upon information and belief." Plaintiffs otherwise would not alter the content of the declarations.

I agree with Defendant that the declarations should be stricken. Even if they are amended to delete the introductory statement ("I, [Plaintiff], state as follows upon information and belief ..."), they do not set forth *facts* based on the personal knowledge of the Plaintiffs as would be admissible in evidence, as required by Fed.R.Civ.P. 56(e). Rather, the declarations contain primarily (1) information that is cumulative of other evidence on the record (including statements duplicating Plaintiffs' own deposition testimony and that of other witnesses); and (2) conclusory, unsubstantiated statements. See, e.g., Dalvit Declaration at ¶ 15 ("I know that Jean Massey claims that she wrote the letter placed in our file. That comment and that letter could never have

been placed in our files without the approval of Kevin Mortimer. Nothing like that ever happened in the Denver ramp without Kevin's fingerprints being all over it."). "While an affidavit is certainly an appropriate vehicle to establish a fact for summary judgment purposes, the affidavit must set forth facts, not conclusory statements." *BancOklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1101 (10th Cir.1999); *see also Bones v. Honeywell Intern., Inc.*, 366 F.3d 869, 875 (10th Cir.2004) ("Unsubstantiated allegations carry no probative weight in summary judgment proceedings.") (citations omitted).

The majority of the declarations simply repeat and argumentatively recharacterize other evidence. Beyond that, Plaintiffs merely present their inferences and conclusory assertions regarding Mortimer's control over the department and practice of discriminating against women, United's knowledge and the knowledge of various managers, and United's alleged anti-women culture [FN7], and efforts to "bury" Plaintiffs' complaint. Plaintiffs also present conclusory statements regarding differential treatment between men and women, but present no facts to show that they have knowledge of the underlying events. For example, Plaintiff Dalvit asserts in her declaration, "An employee named Paul Fishler was investigated for leaving work early, and Jean Massey conducted the investigation. But he was not suspended without pay, like we were. And the investigation was ultimately dropped with no discipline." Dalvit Declaration at ¶ 7. Aside from offering no facts about when this occurred, whether this employee was in the same department as Plaintiffs and subject to the same policies and management as Plaintiffs (he was apparently not on the FIT team), and whether he was a management level employee like Plaintiffs, Plaintiff offers no facts indicating that she was privy to the presumably

confidential details of the investigation, including what triggered the investigation or its outcome.

FN7. See Benjamin Declaration at ¶ 9 ("It's a good old boy club and if you have one misstep management will come down on you, whereas the men get away with everything").

Plaintiffs argue in response that the hearsay portions of the declarations are admissible because they are admissions of a party opponent. While some of the hearsay statements contained in the declarations may be admissible on this basis, this is not the case when Plaintiffs merely restate and recharacterize another witness's deposition testimony, as is the case here. Plaintiffs also argue that their lay witness conclusions and observations are admissible pursuant to FRE 701. Plaintiffs' argument misses the point, however, as it fails to distinguish between Plaintiffs' opinions, which could be admissible in trial if the requirements of Rule 701 are satisfied, and facts. Plaintiffs' opinions, offered with little or no foundation, are not facts pursuant to Fed.R.Civ.P. 56(e) and are not sufficient to create genuine issues for the purposes of defeating Defendant's motion. *See Salguero v. City of Clovis*, 366 F.3d 1168, 1177 n. 4 (10th Cir.2004) ("these assertions are not supported in the record nor does [plaintiffappellant's] affidavit demonstrate any personal knowledge or corroborating evidence, and, as such, are insufficient to create a genuine question of material fact ..."). Although some portions of the declarations may be admissible as facts based on the personal knowledge of the Plaintiffs, such information appears elsewhere in the record and will be considered on that basis. Accordingly, Defendant's motion will be granted.

Plaintiff's proposed amendment, to indicate that the information is based on Plaintiffs' knowledge rather than "upon information and belief," will not cure the significant deficiencies in the affidavits. Therefore, I will deny Plaintiffs' motion to amend as futile.

B. *Motion for Summary Judgment*

1. *Title VII discrimination and retaliation*

Defendant argues that Plaintiffs cannot establish a *prima facie* case because they cannot show an adverse action or disparate treatment (or other circumstances giving rise to an inference of discrimination). In addition, Defendant contends that even if Plaintiffs could establish *prima facie* cases, they could not demonstrate that United's actions were pretextual. Defendant makes a similar argument with respect to Plaintiffs' retaliation claim, i.e., that Plaintiffs cannot show adverse action and cannot show that any adverse action was causally connected to their protected activity. I will address each alleged adverse action in turn.

Suspension without pay: There is little doubt this could be an adverse action in light of the United States Supreme Court's recent ruling in *Burlington Northern*, a Title VII retaliation case involving indefinite suspension without pay, even if the pay is eventually restored. 126 S.Ct. 2417-18 (upholding jury's finding that indefinite suspension without pay was materially adverse, even where back pay was given after suspension ended). The cases cited by United all pre-date the *Burlington Northern* decision and are inapplicable.

Moreover, I conclude that Plaintiffs have proffered some evidence to establish that they were treated differently from the men on the FIT team. Plaintiffs have offered evidence, some of which may be admissible, that

some of their male team members may have worked shorter days but were not investigated and suspended for it. Accordingly, I conclude that Plaintiffs may be able to establish a prima facie case in this regard.

Notwithstanding, I agree that Plaintiffs cannot demonstrate that the nondiscriminatory reason for the suspension was a pretext for unlawful discrimination. It is undisputed that the investigation of Plaintiffs was triggered by complaints from at least two other employees or managers outside of the group. Moreover, according to Nail, the spreadsheets he assembled showed that Plaintiffs and VanDyke [FN8] worked less than eight hour shifts on some days, but that the other team members appeared to have worked full shifts. [FN9] Plaintiffs have not rebutted this testimony and their unsupported allegations of intentional destruction of evidence are not sufficient to do so. Again, the undisputed evidence shows that all of the spreadsheets were provided to Massey, who by all accounts was an independent investigator. There is no evidence that Mortimer or Nail somehow prejudged or influenced the decision. It was Massey's decision, based on the evidence she had, to suspend the Plaintiffs during the investigation.

FN8. There is no explanation for why VanDyke, who apparently committed the same alleged infractions as Plaintiffs, was not also investigated and placed on suspension. However, since VanDyke is in the same protected class as Plaintiffs, the more favorable treatment she apparently received does not give rise to an inference of discrimination.

FN9. There is also evidence that while Plaintiffs did not inform Nail when they were leaving early (because they justifiably believed it was not necessary), the other team

members may have kept Nail better informed.

It is well-established in this circuit that " "[t]he relevant inquiry is not whether the employer's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs." *Rivera v. City and County of Denver*, 365 F.3d 912, 924-25 (10th Cir.2004) (internal quotation marks and alteration omitted); *see also Kendrick*, 220 F.3d at 1231 ("[A] challenge of pretext requires us to look at the facts as they appear to the person making the decision to terminate plaintiff."). Thus, even if the stated reasons later prove to be untrue, I must examine whether the supervisor believed those reasons and made a good faith decision at the time of the discharge. "The reason for this rule is plain: our role is to prevent intentional discriminatory hiring practices, not to act as a 'super personnel department,' second guessing employers' honestly held (even if erroneous) business judgments." *Young v. Dillon Comp.*, 468 F.3d 1243, 1250 (10th Cir.2006) (citations omitted).

Plaintiffs have provided no evidence tending to show that Massey did not honestly believe that the complaints, spreadsheets, and information she received from Nail showed that Plaintiffs had worked shifts of less than eight hours and that this was contrary to the instructions of Nail and company policy. Similarly, there is no evidence in the record from which a reasonable jury could infer that Massey, at the time she made the decision to suspend Plaintiffs, knew that men on the team had left early but were not being investigated for it. It does appear to be unfair that Plaintiffs were suspended based on conduct that they believed in good faith was approved by their manager, but that does not make it discriminatory.[FN10]

FN10. Plaintiffs also appear to argue that discrimination is shown because Nail had made sexist comments in the past, and Nail brought the issue to Mortimer's attention. A plaintiff must demonstrate a nexus between allegedly discriminatory statements made by a supervisor and the adverse action. *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th Cir.1994). To demonstrate the causal nexus, the plaintiff must show that "the allegedly discriminatory comments were directed at [the plaintiff], her position, or the defendant's policy which resulted in the adverse action taken against the plaintiff." *Id.* I see no such connection here, particularly where the investigation was triggered by complaints from at least two other employees or managers.

Plaintiffs argue that pretext is shown because Massey should have known at the time of the suspension that Plaintiffs were innocent. I disagree that the evidence before Massey at that time was so compelling that she should have known that no rule violation had occurred. Nail told Massey that he had instructed his team they could work flexible hours but were still expected to work full eight hour shifts. The spreadsheets showed that Plaintiffs had worked less than eight hours on certain days, even if they had made up that time on other days. Based on this evidence, I cannot conclude that Massey's belief that Plaintiffs may have violated United's rules was unjustified or implausible. [FN11]

FN11. Massey interviewed the other team members approximately a week or two later and discovered that they had the same understanding as Plaintiffs regarding hours. It appears that shortly thereafter she determined there was no rule violation and returned Plaintiffs to work.

Plaintiffs also contend that the evidence of Mortimer's conduct after their suspension demonstrates pretext at the time of the suspension decision, as does the alleged "good old boy" culture of United. Again, I disagree. Although Mortimer's actions and statements are relevant to other claims by Plaintiffs, they are irrelevant here. Despite Plaintiffs' conclusory assertions that Mortimer controlled every event in this story, the undisputed evidence shows that Massey was the decisionmaker with respect to the suspension, which was approved by a Chicago human resources representative. Similarly, Plaintiffs' evidence regarding a general practice of United to discipline women for time sheet violations but not men is vague and lacking in foundation; such decisions apparently involved numerous different managers making decisions at unrelated times and under different circumstances, and Plaintiffs clearly do not have personal knowledge the details of all such personnel decisions. Their conclusory assertions that men were treated more favorably then they were in "identical" circumstances is lacking in foundation, as Plaintiffs have presented little or no information about the underlying facts of their supposed comparators .[FN12] Plaintiffs have pointed to no facts in evidence to indicate that Massey's decision was a pretext for unlawful discrimination. Accordingly, I agree that Plaintiffs' claim of discrimination, to the extent it is based on United's decision to suspend Plaintiffs without pay during the investigation, should be dismissed.

FN12. As discussed, Plaintiffs did present evidence that they observed the male FIT team members leaving early, but it is not clear whether this occurred when these co-workers were assigned to FIT or whether Plaintiffs were in a position to know whether these individuals had worked full shifts on the days they allegedly left early. Even this, however, does not mean that circumstances were identical; Plaintiffs were the subject of complaints

by other managers and employees and had missed a briefing that they were told by their OM to attend, circumstances that do not appear to be present with other employees.

I note that Plaintiffs have not asserted that they engaged in any protected opposition to discrimination before the suspension; accordingly, to the extent that Plaintiffs contend that the suspension was retaliatory, such a claim should also be dismissed.

Removal from FIT Team: Although Plaintiffs' assignment to the FIT team did not mean an increase in pay, tangible benefits, or a promotion, Plaintiffs have presented some evidence that it could assist in advancement at the company (or at least was believed to at the time). Plaintiffs appear to argue that, as a corollary, removal from the team would harm their future employment with United. Employment actions that impact an employee's future career prospects can be adverse for the purposes of Title VII. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir.1996); *see also Robinson-Reeder v. Am. Council on Educ.*, 532 F.Supp.2d 6, 16 (D.D.C.2008).

Here, however, Plaintiffs have offered no evidence, other than their own speculation, that removal from the FIT team could negatively affect their career advancement. The team was temporary, and indeed is apparently no longer in existence. There is no evidence that being a member of such a team was a prerequisite to any other positions at United, or that other hiring managers would have reason to question Plaintiffs' removal from a temporary special assignment. Accordingly, I agree with United that removal from the FIT team, standing alone, was not an adverse action.

Letter of Counsel: By contrast, Plaintiffs have presented evidence from which a reasonable jury could infer that the letter of counsel admonishing Plaintiffs amounted to an adverse employment action. The disputed and undisputed facts show that Plaintiffs would have to disclose this letter to other managers if they sought other jobs in the company. They have also presented evidence that a manager making a hiring decision could use a letter like this as a way of eliminating prospects and thus would reduce their chances of being promoted. Plaintiffs have presented evidence that this letter was going to remain in their files for five years, and thus could have a long-lasting effect. Moreover, the tone of the letter strongly suggests wrongdoing, even though it is undisputed that Plaintiffs did not violate any rules or policies. I take note that Plaintiffs were management level employees and would be seeking positions of responsibility; the letter suggests the writer has "doubt in your ability to successfully manage employees and lead the department on a special assignment," language that certainly could dissuade another United manager from hiring Plaintiffs in a more senior position.

I note that in most cases where the court found that warning letters were adverse there were typically numerous warnings or "write ups" that increased the employee's chances of discharge, whereas this case involves a single warning letter. *See e.g.*, *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1104 (10th Cir.1998). Nonetheless, the Tenth Circuit instructs that I must "liberally interpret" whether an adverse employment action exists, examining the unique factors relevant to the particular situation. *Haynes v. Level 3 Comm'ns, LLC*, 456 F.3d 1215, 1222 (10th Cir.2006). Given the circumstances presented here, I conclude that the letter of reprimand could amount to an adverse action.

The next issue is whether there is evidence suggesting that the letter was discriminatory or retaliatory. Again, the undisputed evidence is that Massey decided that admonishment was appropriate. Although she informed Mortimer, there is no evidence that he had any input in the content of the letter. In addition, it appears that her decision was also supported by the human resources representative whom she kept apprised during the investigation. Similarly, although aspects of this letter appear to be unfair, as a jury could find that Plaintiffs acted in reliance on their understanding of Nail's directions and there is evidence that Plaintiffs' discussions with other employees did not violate any rule or practice, this does not raise an inference of discriminatory or retaliatory motive. Again, it is undisputed that Plaintiffs did leave early, that they did miss a briefing that their supervisor directed them to attend, that others complained about their attendance, and that they did talk to other team members after being told there was an investigation into their conduct. Given this, and the absence of facts indicating a retaliatory [FN13] or discriminatory motive on the part of Massey or evidence that she acted at Mortimer's behest, I cannot conclude that her reason for admonishing Plaintiffs was false, contrary to policy or practice, or otherwise indicative of pretext. There are simply no facts from which a jury could conclude that Massey did not honestly believe that Plaintiffs had acted inappropriately as members of management, even if their conduct did not violate any policy. As noted, it is not this Court's role to ensure fairness in the workplace, but only to provide remedies for such conduct that is prohibited by law. Accordingly, I agree that Plaintiffs cannot demonstrate that the decision to issue the admonishment letter was a pretext for unlawful discrimination or retaliation.

FN13. It is undisputed that Massey did not learn of Plaintiffs' complaint of discrimination until the initiation

of this lawsuit.

Action Plan: I agree with Defendant that the 90 day action plan implemented by Patterson-Eachus was not an adverse action. *Haynes*, 456 F.3d at 1224. There is no evidence that this affected Plaintiffs' tangible employment benefits in anyway or had any effect on their promotion prospects once it was completed.

Interference with Promotion and Evaluation: Plaintiffs have provided evidence that after Plaintiffs returned from suspension, Mortimer directly interfered with their professional advancement and evaluations, which in turn affected their salaries. Plaintiffs' evidence is that Mortimer refused to approve their transfers to a shift that would assist them in getting experience needed to advance. Similarly, Plaintiffs have presented evidence that Mortimer instructed their supervisor to lower their performance evaluations, and that such evaluations affect salary levels. These facts, if credited, would demonstrate an adverse action. Plaintiffs also have carried their burden to show that Mortimer's motivation in this regard was to retaliate against Plaintiffs for their complaint of discrimination. It is undisputed that Mortimer was aware of their protected activity at this time. In addition, Patterson-Eachus's testimony provides direct evidence that Mortimer sought to retaliate against Plaintiffs by preventing their transfers and promotions and by lowering their performance evaluations.

Defendant, however, contends that Plaintiffs cannot base their claim on this conduct because it was not included in their charge of discrimination to the EEOC. An employee may not assert a claim under Title VII claim based on conduct not first asserted in a discrimination charge filed with the EEOC or other proper administrative agency. *Holmes v. Utah, Dept of Workforce Services*, 483 F.3d 1057, 1070 (10th Cir.2007).

Both Plaintiffs filed charges of discrimination with the Colorado Civil Rights Division and EEOC on or around April 13, 2005. Exh 20, 21 to Resp. to Motion for Summary Judgment (docs no 33-21 and 33-22). Both Plaintiffs checked the box on the first page of the charge form for "Retaliation." As particulars underlying the charge, Plaintiffs refer to the suspension, removal from special assignment, probation, disciplinary letter, and pay disparities (a claim later dropped by Plaintiffs). Dalvit submitted a second charge of discrimination on or around September 21, 2007, in which she alleged that she was constructively discharged on or around August 10, 2007. Exh. 30 to Resp. To Motion for Summary Judgment (doc no 33-31). In it, she asserts that she suffered harassment and retaliation as a result of complaining about discrimination, specifically that she applied for numerous jobs but her application was not processed, that she was placed on an action plan and had a disciplinary letter placed in her file, and that the company failed to investigate her discrimination complaint. The issue before me, then, is whether Mortimer's alleged conduct reasonably falls within the charges of discrimination filed by Plaintiffs. *MacKenzie v. City and County of Denver*, 414 F.3d 1266, 1274 (10th Cir.2005) ("A plaintiff's claim in federal court is generally limited by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination submitted to the EEOC.").

The Supreme Court has made clear that each discrete incident of discriminatory or retaliatory conduct constitutes its own "unlawful employment practice" for which administrative remedies must be exhausted. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Martinez v. Potter*, 347 F.3d 1208 (10th Cir.2003). Although Plaintiffs clearly asserted a charge of discrimination based on alleged retaliation, they did not

include the specific retaliatory acts identified by PattersonEachus in her deposition. I conclude that these acts, i.e., preventing Plaintiffs from transferring to other shifts and directing that Plaintiffs' performance evaluations be lowered, are discrete incidents that must first be the subject of an administrative charge before being heard in this court.[FN14] I understand that Plaintiffs did not discover this evidence until after the commencement of the litigation, which could toll the time for filing such a charge, but this does not excuse the exhaustion requirement. *Martinez*, 347 F.3d at 1210-11 (exhaustion rule "is equally applicable ... to discrete claims based on incidents occurring *after* the filing of Plaintiff's EEO complaint.") (emphasis in the original). Accordingly, I agree with Defendant that Plaintiffs' claims cannot be premised on this alleged adverse action.

FN14. I do not opine as to whether these actions are fairly encompassed in Dalvit's second charge of discrimination (i.e., constructive discharge); as discussed below, the second charge is now the subject of a separate lawsuit.

Constructive Discharge and Hostile Work Environment. As discussed above, Dalvit has also asserted that she was constructively discharged and subjected to a hostile work environment. A right to sue letter on Dalvit's second charge of discrimination was issued February 1, 2008, after United filed its Motion for Summary Judgment. Although Plaintiff initially sought to amend her complaint to assert a constructive discharge claim, she has withdrawn that motion and filed a separate lawsuit concerning this claim (Civil Action No. 08-cv-00881-RPM). Nonetheless, in her supplemental brief, Plaintiff argues that the second charge of discrimination and right to sue letter can be retroactively applied to allegations contained in the complaint now governing this lawsuit. I disagree. Such a proposition completely ignores the

legislative scheme governing Title VII claims, which requires exhaustion of administrative remedies before such claims can be asserted in a lawsuit. Plaintiff did not provide any legal authority demonstrating that a party can reverse this order by preemptively asserting claims that have not yet been exhausted and then later "curing" this defect with a later-filed charge of discrimination. I agree with Defendant, moreover, that permitting this would cause Defendant prejudice, as discovery and summary judgment briefing was based on the claims contained in the first charge of discrimination and the complaint derived from it. Accordingly, I conclude that the question of whether Plaintiff Dalvit was constructively discharged and or suffered retaliation or discrimination from a hostile work environment is not at issue in this case.

3. *Retaliation for exercise of FMLA rights*

Defendant first argues that Plaintiff Benjamin cannot base her FMLA claim on any events occurring more than 300 days before the filing date of her EEOC charge. Defendant cites no appropriate legal authority for this proposition, as it has conflated the remedies for FMLA with Title VII. FMLA has its own enforcement provisions under 29 U.S.C. § 2654, which permits an employee to file a complaint with the Secretary of Labor or to file a private lawsuit. If the employee files a private lawsuit, "it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful." 29 C.F.R. § 825.400(b). Accordingly, I will consider Plaintiff's evidence of alleged adverse actions occurring up to two years prior to the filing of her lawsuit.

Notwithstanding this timeline, however, I agree that Plaintiff Benjamin cannot demonstrate a prima facie case of retaliation for her use of FMLA time. In her response

brief, she argues that causation is shown by the following chain of events: "(a) plaintiff was chastised by Steve Peters for her dependability in connection with her use of her FMLA, (b) plaintiff complained to the ramp manager [i.e., Mortimer], who warned Peters of the legal prohibition against taking an adverse action against an employee for use of FMLA, (c) Peters then placed plaintiff on an action plan relating to her dependability, (d) Peters then falsely complained to plaintiff's new boss on special assignment with the FIT team (Nail) that he thought plaintiff was shorting the company on hours worked, (e), which falsely triggered an investigation and gave Mortimer the opportunity to suspend plaintiffs without pay for one month, followed by a string of adverse actions." Plaintiffs' Opp. (doc no 31) at 31 n. 6.

Even if Plaintiff could demonstrate that Peters retaliated against her by making a false complaint, which then triggered the investigation, this fact is immaterial. It is undisputed that at least one other employee also complained about Plaintiffs' attendance while they were on the FIT team. Moreover, as discussed above, the relevant decisionmaker thereafter was Massey, and there is no evidence that Massey was aware of Plaintiff's use of FMLA or that Peters influenced the course of the investigation or its outcome in any way. These events, therefore, do not constitute adverse actions causally connected to Plaintiff's FMLA leave.

Plaintiff testified in her deposition that Peters, when he was her supervisor, placed her on several action plans regarding her "dependability." Defendant disputes that this was the reason for the action plans but offers no contradictory evidence. Nonetheless, as discussed above, I conclude that the action plans, without more, were not adverse actions sufficient to support a claim of retaliation under FMLA. Moreover, it appears that Peters thereafter gave Defendant Dalvit a positive performance review and

she was invited to be on the FIT team. Under these circumstances, I conclude that Plaintiff Benjamin's FMLA retaliation claim also fails as a matter of law.

Accordingly, it is ordered:

1. Defendant's Motion for Summary Judgment (doc no 28) is granted. Summary judgment shall enter in favor of United Air Lines, Inc., and against Plaintiffs on all claims.

2. Defendant's Motion to Strike Declarations (doc no 45) is granted.

3. Plaintiff's Motion to Substitute Amended Declarations in Opposition to Motion for Summary Judgment (doc no 53) is denied.

4. Defendant may have its costs.

5. Defendant's Motion to Dismiss (doc no 83) is denied as moot.